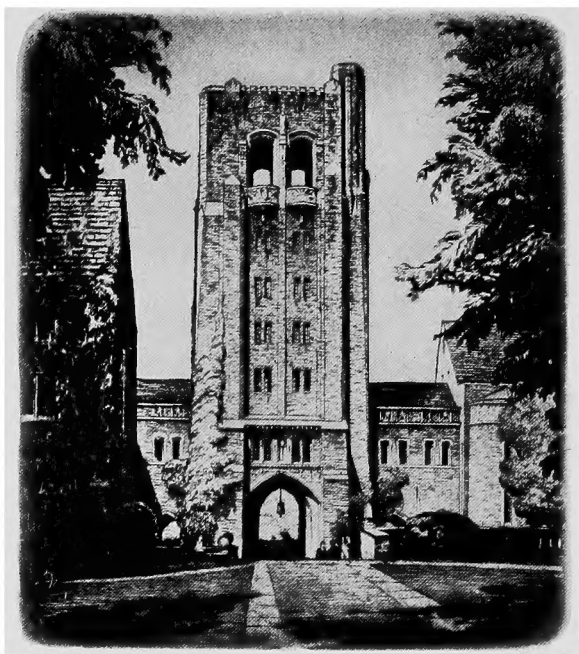




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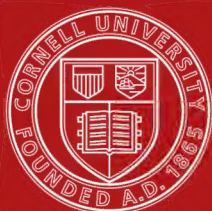
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THE  
LAW RELATING  
TO  
BANKS AND THEIR DEPOSITORS  
AND TO  
BANK COLLECTIONS.

BY  
ALBERT S. <sup>Sidney</sup> BOLLES,

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GEN. WAGER SWAYNE  
AS A MARK  
OF THE AUTHOR'S REGARD  
FOR  
HIS FRIENDSHIP  
AND  
LEGAL ATTAINMENTS.





## P R E F A C E .

---

THE aim of this work is to present in language which can be easily and fully understood the law of banking contained in the reported decisions of the American and English courts. No American work of the kind exists. The works of Messrs. Morse and Grant are especially for the lawyer; while those of Messrs. Walker and Hutchison, if less technical, are for the English reader.

I have endeavored to state the principles relating to the subject as simply as possible; but I have added many illustrations, drawn from cases that were before the courts, for the purpose of rendering the principles plain should I have happened to state them obscurely in the text, and also of showing some of the conditions under which they have been applied.

While thus having the banking class at shorter range than the members of the legal profession, I have tried to make a work that would also be helpful to lawyers. It is eight years since the second edition of the work of Mr. Morse was published; and during that period a large number of important cases have been decided. These are given here, besides many others of an earlier period which are not included in his work.

Much time has been spent in verifying the cases and

quotations. If, therefore, the spelling of some of the names is somewhat unusual, I am quite confident that the reader will find on examination of the authority where the names occur that the spelling here given is correct. In some instances, too, the same bank or personal name is reported differently on different occasions; for example, McDowell is sometimes reported M'Dowell on a second trial of the same case, or in another controversy. I have used only one name in the index for these cases.

In order to render the work more authoritative the language of the courts has been used whenever this could be done with due regard to a fitting treatment of the subject, especially in those cases in which I thought that the principles of law did not perfectly square with the popular knowledge of them. It may be added that the quotations are rendered with exactness, save in a few instances in which the name of a person or association has been substituted for plaintiff, or plaintiff in error, or other technical term. In almost every instance the change has been indicated by appropriate marks in the text.

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 " 159, last line of text, *insert* quotation marks after "assignment."  
 " 242, 2d line from bottom, *for* Schofield, *read* "Scholfield."  
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 " 322, 12th line from top, *for* grantor *read* "guarantor."  
 " 341, 7th line from bottom of text, *insert* quotation marks after "fund."  
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BOOK I

THE

RECEIVING AND KEEPING OF DEPOSITS.



THE  
LAW RELATING  
TO  
BANKS AND THEIR DEPOSITORS.

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CHAPTER I.

KINDS OF DEPOSITS AND LIABILITY FOR THEIR LOSS.

§ 1. **Nature of a deposit.** (a) *What it is.* A very important part of the business of banking consists in receiving, keeping, and refunding the money of persons who are called depositors. Originally, a deposit, says Judge Learned, "was a thing delivered to a person for gratuitous safe-keeping; and it remained the property of the owner. The word, however, is now used to designate a certain kind of loan. For money, deposited in the ordinary way, becomes the property of the bank or banker; and the deposit is a debt."

(b) *The present affected by former meaning.* "When we attempt to state what kind of loans are properly called deposits, we find that, to some extent, the original meaning of the word colors its present meaning. For there is an idea in the mind that money on deposit is lying in the bank on hand, ready to meet the demand of the owner, and that it is kept there for convenience."

(c) *Deposit is a loan to a bank or banker.* "While it is difficult to make an accurate definition of a deposit, which shall distinguish it from every other loan, yet there are many particulars by which it may be described. And generally we

may say that it is a loan to a bank or banker; that it is made for the convenience of the lender (or depositor), in his business; that it is variable in amount from time to time; that it is subject to be demanded at any time and in any amount; that it is evidenced only by entries on a pass-book, and on the books of the bank; that it is paid out upon checks of the depositor, to be paid at once, on presentation, without notice."<sup>1</sup> This description of a deposit may be completed by adding Judge Paxson's remark that "there is no doubt as to the right of a depositor to control his deposit up to the point where the rights of others attach. He may apply it to a particular purpose by making it a special deposit, or by specific directions communicated to the bank."<sup>2</sup>

§ 2. **The distinction between special and general deposits.** Deposits are special or general. The former, says Judge Miller, "are those in which the bank becomes bailee of the depositor, the title to the thing deposited remaining with the latter; and that other kind of deposit of money peculiar to banking business, in which the depositor, for his own convenience, parts with the title to his money, and loans it to the banker, and the latter, in consideration of the loan of the money and the right to use it for his own profit, agrees to refund the same amount or any part thereof, on demand." Most deposits are of this class. A bank may act as agent for another, or for an individual, in collecting a note, but when the money is collected and duly credited, it becomes a general deposit like any other.<sup>3</sup>

<sup>1</sup> Matter of Patterson, 18 Hun, 221.

<sup>2</sup> Com. Nat. Bank v. Henninger, 105 Pa. p. 500. "It is not strictly a deposit, nor a bailment of any kind; for the same thing is not to be returned, but another thing of the same kind and of equal value. In the civil law it is called a *mutuum*, or loan for consumption," Bronson, J., in Downes v. Phenix Bank, 6 Hill, p. 299.

<sup>3</sup> Marine Bank v. Fulton Bank, 2 Wall. p. 256. In the words of Judge Stuart, in State v. Clark, 4 Ind. p. 316, "Where the very silver or gold deposited is to be restored, the transaction is a special or pure deposit. But where the party is to restore, not the identical coin, but only an equivalent, on demand, the books call it a loan or *mutuum*, or irregular deposit." In

§ 3. **Liability for the loss of general and special deposits.** Whenever a general deposit is lost, the depository, though faultless, is liable.<sup>1</sup> Whenever money is specially deposited in a bank for safe-keeping, the risk is the depositor's. If stolen, lost, or destroyed, through no fault of the bank, the depositor sustains the loss. Under the same circumstances a general depositor would not lose. As his money, checks, or bills become the property of the bank, he is a creditor, and has no claim on them.<sup>2</sup>

§ 4. **When directors are liable for their loss.** Not only the officers of a bank, but the directors also may become liable to depositors for grossly neglecting to protect their deposits. "Ordinarily the character of the directory for integrity and business capacity measures the degree of confidence reposed in the corporation by the public. Were depositors, when entrusting to a bank their entire fortune, to be informed that the directors, upon whose honor and careful watchfulness they were relying, owed them no duty, were under no obligations to take at least reasonable precautions to guard their money from the itching fingers of dishonorable officials, they would certainly hesitate long before surrendering it upon such terms. There are many risks and uncertainties against which a prudent business man never expects the directors or managers of banks to insure him. He knows that for the usual hazards of business he must look to the bank alone, that for the ordinary negligence of directors they are responsible alone to their

Keene v. Collier, 1 Met., Ky., p. 417, Judge Duvall said: "Deposits of money with banking corporations, or with bankers, are either general or special. A special deposit is where the specific money, the very silver or gold coin, or bills deposited, are to be restored, and not an equivalent. A general deposit is said to amount to a mere loan, and the bank is to restore, not the same money, but an equivalent sum, whenever it is demanded."

<sup>1</sup> Commercial Bank v. Hughes, 17 Wend. 94; Concord v. Concord Bank, 16 N. H. 26; Wray v. Tuskagee Ins. Co., 34 Ala. 58. A bank is responsible for the safe-keeping of the money of a depositor, and it cannot set up the fraud of its own officers as an answer to a demand for repayment, Steckel v. First Nat. Bank, 93 Pa. 376; Ziegler v. Same, Id. 393; Resh v. Same, Id. 397.

<sup>2</sup> Franklin Bank, 1 Paige, 249.

principal; but for such gross negligence or incompetency as shows a reckless disregard of their duty to care for and protect the funds committed to their charge, we think they are directly responsible to the depositor." In *Delano v. Case*,<sup>1</sup> from which we have been quoting, the "directors were notified ten months before the failure by the president, of his suspicions that Compton<sup>2</sup> was stealing from the bank, when the slightest examination would have exposed the true state of affairs and protected subsequent depositors. No examination whatever was made. Under such circumstances there was clearly another duty which the directors owed to the community. If they knew that the bank was insolvent, or if their suspicions were aroused, and they recklessly closed their eyes and made no effort to discover the truth, it was their duty not to receive the money of depositors ignorant of the true state of affairs. To do so when they had but a suspicion of the danger would be a great wrong, and if with full knowledge, would now be a felony. If we are correct in these views, it follows that appellants owed a duty to appellee which they have not performed, in consequence of which he has been injured, and for which he ought to have a remedy; for it is a maxim of the common law that a man specially injured by breach of duty in another should have his remedy by action."<sup>3</sup>

§ 5. **Kinds of special deposits.** Special deposits are of two kinds: those which are to be kept gratuitously and delivered by request of their owner; and those which are to be applied in a specified manner, like money deposited for discharging an obligation payable at the depository.<sup>4</sup> The second kind of special deposits include all which are held by a bank as agent, trustee, or in other fiduciary relation;<sup>5</sup> in

<sup>1</sup> 17 Brad. 531.

<sup>2</sup> The assistant cashier.

<sup>3</sup> But the mere fact of depositing money in an insolvent bank supposing it to be solvent, and losing it will not suffice to sustain a cause of action against the directors, *Duffy v. Byrne*, 7 Mo. App. 417.

<sup>4</sup> *National Bank v. Speight*, 47 N. Y. 668; *Parker v. Hartley*, 91 Pa. 465.

<sup>5</sup> *Brahm v. Adkins*, 77 Ill. 263.

short, all except those held by a bank as debtor of the depositor.

**§ 6. Rule of liability for loss of special deposit of first kind.**

(a) *Gross negligence defined.* Special deposits of the former kind have been kept for a long period by banks to accommodate their customers. They consist chiefly of bonds, stocks, and other securities. When gratuitously received, the bank is liable for their loss, if this be occasioned by gross negligence. This has been defined, says Judge Allen,<sup>1</sup> "in various ways. . . It is incapable of precise definition, and its application and use may lead, in some cases, to results unsatisfactory; but that comes as directly from the nature and extent of the duty in the particular case, as from the phrase by which a breach of the duty is expressed. . . What constitutes gross negligence, that is, such want of care as would charge a bailee for loss, must depend very much upon the circumstances to which the term is to be applied. It has been defined to be the want of that ordinary diligence and care which a usually prudent man takes of his own property of the like description. This definition is given by a reference to the degree of care, rather than the degree of negligence, which may be the easier and more intelligible mode of defining the extent of the obligation, and the measure of duty assumed. Ordinary care as well as gross negligence, the one being in contrast with the other, must be graded by the nature and value of the property and the risks to which it is exposed. A depositor of goods or securities for safe-keeping with a gratuitous bailee, can only claim that diligence which a person of common sense, not a specialist or expert in a particular department, should exercise in such department."

(b) *In Patterson v. Syracuse National Bank,*<sup>2</sup> the institution had been accustomed to receive packages, which were supposed to contain securities, from persons for safe-keeping. Among those who left a package was the plaintiff. It con-

<sup>1</sup> First Nat. Bank v. Ocean Nat. Bank, 60 N. Y. p. 295.

<sup>2</sup> 80 N. Y. 82.

tained bonds, and was delivered to the teller. The bank was managed by the cashier, the teller thus acting in the cashier's absence. The teller testified that he told the plaintiff when leaving the deposit that it would be at his own risk, but this the plaintiff denied. The teller also testified that the cashier sometimes told persons when depositing packages that these would be at their own risk, but that on other occasions packages were received without such notice. The plaintiff's package remained at the bank two years during which he took it out occasionally to cut off the coupons. Then it was lost. The court submitted to the jury the question whether the teller had been authorized to receive such deposits, whether he did so in his individual capacity, or in behalf of the bank, and whether he told the plaintiff that the package would be at his own risk, and whether the teller had been directed to discontinue receiving deposits of securities, and instructed the jury that if the deposit was with the teller as an individual, the plaintiff could not recover. "We think," said the court, "the evidence was sufficient to justify the submission to the jury of the questions of the authority of the teller, and whether the deposit was with the bank, in this manner, and that their verdict establishes such authority, and that the deposit was with the bank, and not with the teller in his individual capacity. The entire management and control of the affairs of the bank having been left with the cashier, his acts and the authority conferred by him upon the teller, must be deemed binding on the corporation."

(c) *Was the bank negligent?* "The verdict," continued the court, "thus establishing that the plaintiff's securities were received on deposit by the bank, it was bound either to return them or show some sufficient ground for not doing so. It claims that they were stolen from the safe by some person other than the employes of the bank, and the remaining question in the case is whether the theft was suffered through the the gross negligence of the bank in the care of the bonds. . . There was no burglary, and no direct explanation of the circumstances of the loss of the bonds, but there is evidence in



the case tending to show that, if stolen, the theft was committed in the day time while the bank was open; that the bonds were in a safe so situated as to be accessible to a person entering from the street; that the persons in the bank were so placed that at times the safe was not in their view, and that sometimes the door of the safe was left open. The jury could from the evidence have found that the theft was committed by some person entering from the street and finding the safe open, who abstracted the plaintiff's package without being observed by any one in the room, and that leaving the property thus exposed was gross negligence. That property of the bank was stolen at the same time and from the same place was regarded conclusive evidence of gross negligence.<sup>1</sup>

(d) *First National Bank v. Ocean National Bank*.<sup>2</sup> This case was to recover the value of bonds lost, as was alleged, through the latter's negligence. Judge Allen, in giving the opinion to the court, said that "the bank, as depository, taking no pay and taking no risks, was not bound to resort to any special or extraordinary measures to protect the property of the depositor, and the negligence for which it could be charged, or which was the proper subject of evidence upon the trial, was only that which was connected with and directly contributed to the loss. Independent acts of negligence, disconnected with the loss, were not properly admissible in evidence. The defendant was not chargeable with negligence or want of care for not acting upon facts or circumstances not coming to the knowledge of its directors or officers. Facts not brought home to them, tending to show that the property was exposed to loss from some unusual cause, to some peril growing out of peculiar circumstances, were not admissible in evidence against the defendant. The

<sup>1</sup> When valuable things are deposited in the vault of a bank and no compensation is paid for keeping them there, and the effects of the bank are kept in an inner safe in the same vault, the bank is not liable for their loss, Beasley, C. J., *Leeds v. Trenton Bank*, Oct. 1874, N. J. Law & Eq., Dig., page 78.

<sup>2</sup> 60 N. Y. 278.

bailee was only called upon to take such care as became necessary to protect it against risks known to it, or of which it had notice. There was great latitude in the evidence on the part of the plaintiffs . . the purpose and end was to show that the place of deposit was peculiarly and extraordinarily exposed to perils from robbers at that time, calling for more than the usual cautions from the bailee. This was competent, so far as facts and circumstances proved to exist were communicated to the officers of the bank, but no farther.”<sup>1</sup>

(e) *Cases in Ohio, New Jersey, and Louisiana.* In an Ohio case<sup>2</sup> Judge Upson remarked that “the degree of care required of the bank depends upon the nature of the bailment. . . It is usually stated that a bailee who is to receive no reward is liable only for gross negligence, and some of the cases hold that such a bailee is responsible only for the want of that care which is taken by the most inattentive. But that rule cannot be applied to all cases of bailment without reward, for when securities are deposited with persons accustomed to receive such deposits, they are liable for any loss occurring through the want of that care which good business men would exercise in regard to property of such value. This was the degree of care required of the bank in this case. Were the bonds lost for the want of such care? They were demanded. . . and the only excuse given for not deliver-

<sup>1</sup> In *Tompkins v. Saltmarsh*, 14 Serg. & Raw. 275, Duncan, J., in delivering the opinion of the court said: When one undertakes to do a gratuitous act, from which he is to receive no benefit, and the benefit is to accrue solely to the bailor, the bailee is liable only for gross negligence, *dolo proximus*, a practice equal to a fraud. “It is that omission of care which even the most inattentive and thoughtless men never fail to take of their own concerns. There is this marked difference in cases where ordinary diligence is required, and where a party is only accountable for gross neglect. Ordinary neglect is the want of that diligence which the generality of mankind use in their own concerns, and that diligence is necessarily required where the contract is reciprocally beneficial. The bailee is not bound to ordinary diligence, is not responsible for the omission of that care which every attentive and diligent person takes of his own goods, but only for the omission of that care which the most inattentive take.”

<sup>2</sup> *First Nat. Bank v. Zent*, 39 Ohio St. 105.

ing them, as stated in the answer of the bank, was that 'the said bank not having any such bonds in its possession, did not deliver any to the plaintiffs.' No explanation was offered and no reason given for the bonds not being in the possession of the bank. We hold that under these circumstances the proof of demand, and the refusal to deliver, was sufficient evidence that the bonds had been lost by the gross negligence of the bank."<sup>1</sup>

(f) *Essex Bank case*.<sup>2</sup> In this widely known case the court said: "It will not be disputed that if [the contract for keeping special deposits] amounts only to a naked bailment, without reward and without any special undertaking . . . the bailee will be answerable only for gross negligence, which is considered equivalent to a breach of faith; as every one who receives the goods of another in deposit impliedly stipulates that he will take some degree of care of it. The degree of care which is necessary to avoid the imputation of bad faith is measured by the carefulness which the depository uses towards his own property of a similar kind. For although that may be so slight as to amount even to carelessness in another, yet the depositor has no reason to expect a change of character in favor of his particular interest; and it is his own folly to trust one who is not able or willing to superintend with diligence his own concerns." In this case the special deposit was a cask containing gold coin which was fraudulently taken by the cashier and clerk of the bank. The bank was declared not liable, because the theft was a private act. "If the cashier had any official duty to perform relating to the subject," said the court, "it was merely to close the doors of the vault when banking hours were over, that this, together with other property there,

<sup>1</sup> See also the case of *Griffith v. Zipperwick*, 28 Ohio St. 388, which was an action to recover the value of bonds stolen from a bank. If the thing deposited is preserved at the request of the owner, without reward, the depository is not required to use more than ordinary prudence, *Hills v. Daniels*, 15 La. Ann. 280; see also *Levy v. Pike*, 25 La. Ann. 630.

<sup>2</sup> 17 Mass. 479.

should be secure from theft. He cannot, therefore, be considered in any view as acting within the scope of his employment when he committed the villiany; and the bank is no more answerable for this act of his than they would be if he had stolen the pocket-book of any person who might have laid it upon the desk while he was transacting some business at the bank."

(g) *Rule in England.* A case nearly similar has been decided in England. A depositor left a box of securities with a bank, which were kept in a strong-room made for that purpose. Access to this room was only obtained by passing through another where the cashier sat in the daytime and a messenger slept at night. The strong-room had two doors, opened with separate keys, both of which were kept by the cashier in the daytime, and one of them at night. The owner of the box had free access to the room where his box was deposited during banking hours in the presence of one of the bank clerks, when he had occasion to take out coupons for collection. While the box was in the custody of the cashier he abstracted the debentures; nevertheless the bank was not liable for the loss. "It is clear," said the court, "that the bank in this case were not bound to more than ordinary care of the deposit intrusted to them, and that the negligence for which alone they could be made liable would have been the want of that ordinary diligence which men of common prudence generally exercise about their own affairs. . . There was an entire failure of evidence of the want of that ordinary care which the bank was bound to bestow on the plaintiff's deposit. . . The defendant's evidence added to the plaintiff's case the important fact that in the strong-room in which the plaintiff's debentures were kept, there were, beside the boxes of other customers, bills, securities, and specie, the property of the bank, to a very considerable amount. It may be admitted not to be sufficient to exempt a gratuitous bailee from liability that he keeps goods deposited with him in the same manner as he keeps his own, though this degree of care will ordinarily repel the presump-

tion of gross negligence. But there is no case which puts the duty of a bailee of this kind higher than this, that he is bound to take the same care of the property intrusted to him as a reasonably prudent and careful man may fairly be expected to take of his own property of the like description. This was in effect the question left to the jury in *Dorman v. Jenkins*,<sup>1</sup> where Lord Denman told them that 'it did not follow from the defendant's having lost his own money at the same time as the plaintiff's that he had taken such care of the plaintiff's money as a reasonable man would ordinarily take of his own, and he added that the fact relied upon was no answer to the action, if they believed that the loss occurred from gross negligence.'"<sup>2</sup>

(h) *A Pennsylvania case.* *Scott v. National Bank*<sup>3</sup> was another case of a loss of bonds by the theft of the teller. "The taking of the bonds," said the court, "was not an act pertaining to his business as either clerk or teller. The bonds were left at the risk of the plaintiff, and never entered into the business of the bank. Being a bailment merely for safe-keeping for the benefit of the bailor, and without compensation, it is evident the dishonest act of the teller was in no way connected with his employment. Under these circumstances the only ground of liability must arise in a knowledge of the bank that the teller was an unfit person to be appointed or to be retained in its employment. So long as the bank was ignorant of the dishonesty of the teller, and trusted him with its own funds, confiding in his character for integrity, it would be a harsh rule that would hold it liable for an act not in the course of business of the bank, or of the employment of the officer. There was no undertaking to the bailor that the officers should not steal. Of course there was a confidence that they would not, but not a promise that they should not. . . Nothing short of a knowledge of the true character of the teller, or of reason-

<sup>1</sup> 2 Ad. & E. 256.

<sup>2</sup> *Giblen v. McMullen*, L. R., 2 P. C. 317; S. C., 38 L. J., P. C. 25.

<sup>3</sup> 72 Pa. 471.

able grounds to suspect his integrity, followed by a neglect to remove him, can be said to be gross negligence, without raising a contract for care higher than a gratuitous bailment can create."

(i) *A Vermont case.* An important case has been decided in Vermont. Whitney delivered bonds to a bank and received a writing from the cashier stating that they were "for safe-keeping as a special deposit." Having been stolen, Whitney tried to recover their value of the bank. Its duty was "to have kept the bonds in good faith, within its safe, under all the safeguards afforded to like property of its own." Whitney claimed that the bank was negligent in not protecting a passage-way from the rear of the banking-room, behind the counter, by a gate; that the safe was left open during business hours for convenient access of the bank officers in the transaction of business; that a short time about noon each day the bank was left in charge of one person while his associate was absent to dinner. "But," said the court, "there would seem nothing so unusual in these facts, if proved, that they could be accounted negligence, much less gross negligence, such as would charge the defendant."<sup>1</sup> When, therefore, bonds are left with a bank for safe-keeping and no reward is paid for the service, unless more proof is offered than the mere fact that they were stolen, the owner cannot recover.<sup>2</sup>

§ 7. **When is the keeping gratuitous.** Nor is the profit gained by keeping the account of a depositor enough to make a banker a bailee for hire, who is required to exercise more care than when performing the service gratuitously.<sup>3</sup> But the receiving of a commission on the dividends accruing from bonds kept by a banker would be a sufficient reward to render him liable as a bailee for hire.<sup>4</sup>

§ 8. **Negligence is a question of fact.** What negligence renders a bank liable for the loss of a special deposit is a ques-

<sup>1</sup> Whitney v. First Nat. Bank, 55 Vt. 154.

<sup>2</sup> Wylie v. Northampton Nat. Bank, 15 Fed. Rep. 428.

<sup>3</sup> Giblen v. McMullen, L. R., 2 P. C. 317.

<sup>4</sup> *In re* United Service Company. Johnston's Claim, L. R., 6 Ch. 212.

tion of fact to be ascertained in each case. In *Smith v. First Nat. Bank*,<sup>1</sup> which was an action to recover for the loss of bonds, the court said that the evidence furnished no proof of negligence except that which resulted by inference from the fact of loss. But theft by either of the several persons who had access to the vault and to the packages was equally open to inference from the same facts. For a loss in that mode, it is settled that the bank would not be responsible. "The evidence went far to show that the bank did use due care in all its arrangements for the safety of the securities deposited. They were kept in the same vault and safe with the securities of the bank, and the same persons had access to both. There was no evidence of negligence in the selection of cashier or his clerks, or in permitting them to be retained after notice of unfitness. On the other hand, the plaintiff's evidence entirely failed to exclude the possibility of loss by other means than negligence of the defendants. It left the case, therefore, to be decided by mere inference, without any facts to determine which of several inferences was correct. The presumption of innocence would be sufficient to protect the cashier and his clerks from the charge of theft; but that presumption will not avail to sustain the burden of proof in an action against a bank for negligence."

§ 9. **Distinction between loss within and without the official sphere.** (a) *Illustrations.* The cases in which the loss has occurred through the wrongful conduct of a bank official wholly outside his official duty must be distinguished from the cases in which the loss has occurred through his negligent conduct within his official sphere. The following case illustrates the distinction: A stranger, Smith, left bonds with the cashier of a bank for gratuitous safe-keeping, retaining a minute list of them. The bonds were inclosed in an envelope indorsed with the depositor's name and residence, and put into a vault where were other valuable securities. Some time passed and then Smith's personator demanded the bonds, de-

<sup>1</sup> 99 Mass. 605.

scribing them and giving Smith's name and address accurately, but furnishing no other proof of identity. The bonds were delivered, but not long after the true owner appeared. The court held that the jury were justified in deciding that the teller had not taken the pains which the law required to identify the depositor, and consequently that the bank was liable for the amount.<sup>1</sup> But if a person withdraw a special deposit by authority of the depositor, the bank is discharged, though the authority be unknown at the time to the officers.<sup>2</sup> A written authority, however, signed by the depositor on the certificate of deposit in these words: "Will pay above dividends or coupons" (naming a particular person) "for my account," will not justify a bank in parting with the bonds and the certificates of stock described in the certificate of deposit.<sup>3</sup>

(b) *Stated by Kentucky court.* The distinction above noted, defining more perfectly the liability of a bank for the loss of special deposits has been well stated by the Kentucky Court of Appeals. After remarking that the bank in the case before the court "was required to do nothing more than to permit the special deposits to remain in its vault until called for by the depositor," it was added that the "whole duty" of the cashier "consisted in using proper care and diligence in closing and fastening securely the doors of the vault and banking-house when business hours were over. If he turned aside from the discharge of this negative or passive duty, and assumed to act for himself clearly outside of the scope of his employment, and opened the package and bag and appropriated the contents to his own use, then, unless the bank

<sup>1</sup> *Lancaster Co. Nat. Bank v. Smith*, 62 Pa. 47. In the case of the *First Nat. Bank v. Dunbar*, 118 Ill. 625, the cashier when purchasing bonds for a depositor acted as his agent, but not after they were specially deposited in the bank. Subsequently in transferring them to the bank to conceal his own embezzlement, he acted as its agent, thereby rendering it liable for the amount, *aff.* 19 Brad. 558. His knowledge was its knowledge, and it could not in this way acquire a legal title without the owner's consent.

<sup>2</sup> *Chattahoochee Nat. Bank v. Schley*, 58 Ga. 369.

<sup>3</sup> *Id.*



prior to such action had reasonable ground to suspect his integrity, it cannot be made to answer for his fraud or felony.”<sup>1</sup>

(c) *Previous application of distinction in Kentucky.* This principle had previously been applied by the same court, and the directors of a bank were declared liable for the loss of a special deposit of bonds, abstracted and sold by the officers of the institution, and who had used the proceeds in its business. They could not escape because they knew of these wrongful sales, or could have known, by using the most ordinary diligence, by looking at the ledgers and other bank books, and also its correspondence, and statements.<sup>2</sup>

§ 10. **Special contract of deposit.** “Parties to a deposit may unquestionably make a special contract as to the place and manner of keeping the deposit, a breach of which will render the depositary liable. Representations may be made to induce strangers to commence or depositors to continue depositing which will call for increased care on the part of the bailee. But a mere showing to a depositor of the facilities and security of a bank, does not amount to any such representation as will enhance the obligations of the banker in regard to deposits by such depositors.”<sup>3</sup> In Maryland, gold-interest bearing bonds were deposited with bankers on their written promise to return them on demand, or pay their full value including gold interest. Having been lost, the liability of the bankers was determined by the agreement.<sup>4</sup> It hardly need be added that by agreement, a special can be changed into a general deposit.<sup>5</sup>

§ 11. **How second kind of special deposit must be kept.** The second kind of special deposits become so from their intended application. What is the liability of a bank for their safe-keeping? In *McLain v. Wallace*<sup>6</sup> the court remarked of a

<sup>1</sup> *Ray v. Bank*, 10 Bush, 344.

<sup>2</sup> *United Society v. Underwood*, 9 Bush, 609; *Hughes v. First Nat. Bank*, Sup. Ct. Pa., 17 Week. No. Cas. 178.

<sup>3</sup> *Hale v. Rawllie*, 8 Kansas, p. 142.

<sup>4</sup> *Maury v. Coyle*, 34 Md. 235.

<sup>5</sup> *Howard v. Roeben*, 33 Cal. 399; *Chiles v. Garrison*, 32 Mo. 475.

<sup>6</sup> 103 Ind. p. 563.

special deposit that the bank is merely a bailee, and is bound by the terms of the deposit. But, generally, a bank when receiving a deposit of money for a special purpose mingles it with the general deposits of the institution, loans it like other money, and derives a profit therefrom. In such cases, which comprise by far the greater number of special money deposits, we see no reason why a bank should not be held liable for their loss as though they were general deposits.

§ 12. **Bank is not liable for keeping special deposits without knowing it.** When the cashier or other official of a bank receives special deposits voluntarily, it is not responsible for their loss unless the directors know they have been received. If they do know, the bank is responsible, whether specially authorized to receive them or not. And the usage in receiving them is regarded as known by the directors.<sup>1</sup>

§ 13. **What are general and what are special deposits.** (a) *Illustrations.* A deposit is not special unless made so by the depositor, or made in a particular capacity.<sup>2</sup> The adding of the word "clerk" to the name of the depositor does not make the deposit special, nor change the liability of the bank.<sup>3</sup> Nor is money deposited by an officer appointed by the court, like a railway receiver, a special deposit.<sup>4</sup> Nor is a public deposit special which is blended with the general funds of the depository and entered like other deposits.<sup>5</sup> Under the national banking law the phrase "special deposits" embraces the public securities of the government.<sup>6</sup> And if before the

<sup>1</sup> *National Bank v. Graham*, 100 U. S. 699, and cases cited; *First Nat. Bank v. Graham*, 79 Pa. 106; *Lloyd v. West Branch Bank*, 15 Pa. 172; *Steffe v. Bank*, 22 Pitts. L. J. 157.

<sup>2</sup> *Brahm v. Adkins*, 77 Ill. 263; *Neely v. Rood*, 54 Mich. 134; *Ruffin v. Commissioners*, 69 N. Car. 498.

<sup>3</sup> *McLain v. Wallace*, 103 Ind. 562.

<sup>4</sup> *Southern Development Co. v. Houston & Co.*, 27 Fed. Rep. 344. In Tennessee, State bonds purchased with school land funds, and deposited in the Bank of Tennessee by the counties interested, if capable of identification were declared to be special deposits, otherwise general deposits, *State v. Bank*, 5 Baxter, 1.

<sup>5</sup> *Otis v. Gross*, 96 Ill. 612.

<sup>6</sup> *National Bank v. Graham*, 100 U. S. 699.

maturity of paper held by a bank against a depositor an arrangement is made by which it agrees to hold the deposit for a specific purpose, the bank may be regarded as a trustee and the deposit as special.<sup>1</sup>

(b) *Sealed and unsealed deposits.* When "money, not in a sealed packet or closed box, bag, or chest, is deposited with a bank or banking corporation, the law presumes it to be a general deposit, until the contrary appears; because such deposit is esteemed the most advantageous to the depository, and most consistent with the general objects, usages, and course of business of such companies or corporations. But if the deposit be made of anything sealed or locked up, or otherwise covered or secured in a package, cask, box, bag, or chest, or anything of the like kind of or belonging to the depositor, the law regards it as a pure or special deposit, and the depository as having the custody thereof only for safe-keeping and the accommodation of the depositor."<sup>2</sup>

(c) *Deposit of bank bills for redemption.* On the 13th of January, 1824, A., of New York, offered at the Eagle Bank in New Haven some of its bills, and demanded their payment in specie. The officers offered to redeem them by giving a draft for the amount on a bank in the city of New York. This was refused. The bills were then left with the officers to be counted and for payment. Two days afterward the president of the bank sent a draft to an agent in New York with the direction to tender the amount of the bills in specie to A. the next morning. This was done, but the money was refused because two days' interest had accrued. Again A. demanded payment of the bills at the Eagle Bank, which was refused on the ground of payment in New York. He then demanded the bills, which were also refused. In the mean time they had been mingled with the redeemed circulation of the bank. In March, 1824, A. sued the bank, and after three years recovered judgment for the amount and interest. On

<sup>1</sup> National Bank v. Speight, 47 N. Y. 668. See § 171.

<sup>2</sup> Dawson v. Real Estate Bank, 5 Ark. p. 297.

the 31st of August, 1825, the affairs of the bank having become desperate, the funds provided in New York for the payment of the bills were withdrawn. Within a month the bank failed. On the 21st of September the president assigned a quantity of iron to trustees, first, to secure a certain amount to an indorser of the post-notes of the bank, and then, after paying a savings bank the amount of its deposits, to pay all other persons who had ordinary or special deposits with the Eagle Bank the full amount of such deposits respectively. A. sought to obtain the benefit of the assignment as a special depositor, but the court held that he did not sustain that character.<sup>1</sup>

(d) *A deposit is not special by advertising it so.* Nor does a deposit become special simply by the depository advertising that it shall be thus regarded. This principle was applied by the judge of a federal court in Virginia. A bank which had suspended payment advertised that on a certain day it would "resume business by receiving special separate deposits in trust to new account, pledging the bank to use these deposits only in payment of checks against that new account, and as fast as the bank can collect and realize from the loans and securities to pay *pro rata* instalments on its present indebtedness." New deposits were accordingly received, but soon afterward the bank failed again and was adjudicated a bankrupt. A new depositor petitioned the court to be paid in full as a preferred creditor, basing his petition on the claim that the new deposits belonged to the new depositors. But the court held that the new deposits were not special, that no lien was secured on them when they were paid into the bank, that no preference was secured by the advertisement, and consequently that the petitioner was only a general creditor.<sup>2</sup>

**§ 14. Recovery may be had of the thing itself or its value, and profit while keeping it.** (a) *Cases of gold coin.* When a special deposit is not returned, the depositor may bring an

<sup>1</sup> Catlin v. Savings Bank, 7 Conn. 487.

<sup>2</sup> *In re Mutual Building Fund Society*, 15 N. Bank. Reg. 44.

action to recover the thing itself, or the value, of the depositary or of his assignee.<sup>1</sup> If a profit has been made on the deposit, that also may be recovered.<sup>2</sup> If gold coins are specially deposited and not returned when demanded, the depositary must pay their value at the time of converting them to its own use.<sup>3</sup> It has been often held, said the court in an Indiana case, that when the amount of a debt has been ascertained, in view of the national legal tender act, no difference will be recognized between the gold dollar and the legal tender note of the denomination of one dollar as a means of tender or payment. But it did not follow that when the bailee of specific gold coins which were to be redelivered in specie, sold the coins for a premium and failed to redeliver them on demand, he should not answer in damages to the amount which he had realized by the conversion. "That he should have the right to make a profit for himself by his own wrongful act is a proposition having no foundation in justice, and not sanctioned by any principle of law." Notwithstanding the evident soundness of the reasoning in this case, the Supreme Court of Wisconsin has decided the same question the other way.<sup>4</sup> Several cases were cited to sustain the position of the Wisconsin court, but all related to the legality of paying general deposits, notes, and other obligations; not one of them touched the question of liability for a special deposit. Nor did the United States Supreme Court in *Thompson v. Riggs*<sup>5</sup> establish a different rule from the Indiana court, for though the deposit was partly in coin and partly in notes and checks, the evidence clearly showed that the deposit was general and not special, and this view was unequivocally maintained by the court.

(b) *Maryland case of gold coin.* An interesting case per-

<sup>1</sup> *Ex parte Bond*, 1 Mont. D. & D. 10; *Ex parte Brown*, 3 Deac. 91.

<sup>2</sup> Story on Bailments, §§ 122, 123, 269. See *Green v. Sizer*, 40 Miss. 530, concerning the depositor's right to recover.

<sup>3</sup> *Bank v. Burton*, 27 Ind. 426. See *Chesapeake Bank v. Swain*, 29 Md. 483.

<sup>4</sup> *Warner v. Sauk County Bank*, 20 Wis. 492.

<sup>5</sup> 5 Wall. 663.

taining to a special gold deposit was tried in Maryland in 1864. Abell deposited with the Chesapeake Bank \$3000 in gold coin, which was entered on Abell's bank-book, "1861, Dec. 30th, cash (coin) \$3000." The banks of the State had then suspended specie payments, and gold was at a small premium. Abell drew two checks on the bank for the amount—one dated the 27th May, 1864, for \$3000 "in gold coin," and the other, the next day, for the same amount "in coin." When presented for payment the bank refused to pay in gold in both cases, but offered to pay in notes, which were declined. Abell's bank-book was balanced at different times between the date of the deposit and the time of making the checks in question, and the balance in his favor was never below \$3000. In a suit brought to recover the gold, Abell sought to prove that the deposit was special, first, by an express agreement with the bank, and, secondly, that the entry above mentioned explained in the light of the usage then existing among the banks in Baltimore, that deposits in gold coin should be regarded special, imported an agreement to return the specific deposit. The Supreme Court—after remarking on the testimony of a witness of the plaintiff, that it seemed it was not designed that the gold should be placed in the defendant's bank as an ordinary deposit, and that the design was to make some special arrangement in regard to it of which the defendant's officers were made aware, and acceded thereto, and hence the designation of the deposit as coin in the plaintiff's bank-book—held that evidence might be introduced to prove the usage then existing concerning the significance of such entries. "If," said the court, "there be a general and well-established usage or custom upon the subject prevailing with the banks of the city of Baltimore, it may be presumed that the parties acted in reference to such usage, and that terms and conditions not contained in the written entry, and which were not by express words agreed upon at the time, were nevertheless, in the minds of the parties, and formed part of the contract. For," quoting

approvingly the opinion of Baron Parke in an English case,<sup>1</sup> "it has long been settled that, in commercial transactions, extensive evidence of custom and usage is admissible to annex incidents to written contracts in matters with respect to which they are silent. The same rule has also been applied to contracts in other transactions of life, in which known usages have been established and prevailed, and this has been done upon the principle of presumption that, in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but a contract with reference to those usages. But," added the court in the case under consideration, "such usages, to be admissible, must be shown to be well established, uniform, general, and notorious; for it is from those attributes of the particular usage that the presumption arises that the contract was made with reference to it." Such a usage, however, was not proved in this case, nor was the question whether a special agreement had been made determined.<sup>2</sup>

(c) *Recovery of special deposit of uncurrent bills.* Whenever a special deposit consists of uncurrent bills which are returned to the depositor, he cannot recover for them on the ground that the bank has used similar bills in its business.<sup>3</sup> When a special deposit consisted of "cotton money," "confederate money," and "Mississippi treasury notes," which the banker refused to deliver, it was declared in Mississippi that these deposits were money and that an action could be sustained to recover their value. Moreover, the amount which a depositor could ordinarily recover would be the value of the notes. Under some circumstances, however, the depositor could recover for the loss occasioned by the refusal or delay of the banker to return them.<sup>4</sup>

§ 15. **Liability for loss of collateral securities.** It may be added in closing the chapter that when bonds and other pro-

<sup>1</sup> Hutton v. Warren, 1 Mees. & Wels. 466.

<sup>2</sup> Chesapeake Bank v. Swain & Abell, 29 Md. 483.

<sup>3</sup> Rupert v. Roney, 22 Ill. 325.

<sup>4</sup> Green v. Sizer, 40 Miss. 530.

perty are left with a bank as a pledge for securing a loan, or as partly performing some other agreement in which the bank is interested, more diligence is required in keeping them than in keeping deposits for which no compensation is received. Ordinary care at least must be exercised in keeping collateral securities. In *Cutting v. Marlbor*<sup>1</sup> the defendant delivered to a bank collateral securities for a loan, and declining to pay unless it would return them, the receiver sued him for the amount. It was shown, that the trustees of the bank left the entire management to the president and to the manager, that they took the president's statement without question or examination, and that the security was taken from the bank without objection or resistance of any one. "The president had been in the habit of abstracting securities and using them in his private business for six months prior to the failure of the bank." The manager knew of this, and though a trustee, took no measure to prevent it, nor did he notify the other trustees. The trial judge found expressly that the bank "did not exercise reasonable diligence in respect to the care and custody of these securities," and this judgment was sustained by the Court of Appeals. How long the liability of the bank continues after the loan or other agreement for which they are pledged has been discharged is an unsettled question.<sup>2</sup>

<sup>1</sup> 78 N. Y. 454.

<sup>2</sup> *Third Nat. Bank v. Boyd*, 44 Md. 47; *Second Nat. Bank v. Ocean Nat. Bank*, 11 Blatch. 362; *Jenkins v. National Village Bank*, 58 Me. 275; *Dearborn v. Union Nat. Bank*, Id. 273; *Scott, Williams & Co. v. Crews*, 2 S. Car. 522; *Prather v. Kean*, 19 Chicago L. N. 135; *Colebrooke on Collateral Securities*, § 63.



## CHAPTER II.

## NATURE OF ITEMS OF DEPOSITS.—WHEN CHECKS ARE CONSIDERED CASH.

§ 16. **Of what deposits consist.** The general deposits of a bank consist of cash, checks, notes, bills of exchange, and other instruments, but the first two items form by far the larger portion. Are checks and similar instruments payable without restriction considered as cash? A uniform rule has not prevailed.

§ 17. **Ownership of deposits when account is overdrawn.** It is certain that when the depositor's account is overdrawn any deposit that he may make, whether checks, notes, or the like, belong absolutely to the bank. So do they whenever the depositor draws cash on the strength of them.<sup>1</sup>

§ 18. **Ownership of check drawn on the depository.** Let us next inquire how the deposit of a check is regarded which is drawn on the depository. We think the more general rule is, when a check is given to and presented by another depositor of the same bank who is credited for the amount, it cannot

<sup>1</sup> *Balbach v. Frelinghuysen*, 15 Fed. Rep. 675. This principle is unquestionably sound, but another principle stated in that case concerning paper deposited and not drawn against, has been questioned and can hardly be sustained. See Judge Wallace's opinion in *St. Louis & Co. v. Johnson*, 27 Fed. Rep. p. 243. Even a note which is deposited for collection, if passed to the credit of the depositor in his general account and overdrawn, is the property of the bank, and if it should become bankrupt this would be regarded as an asset for the general creditors, *In re Bank of Madison*, 5 Biss. 515; *Ayres v. Farmers and Merchants' Bank*, 79 Mo. 421, and cases cited. If a draft is discounted by a bank and passed to the credit of the drawer and he checks against the amount, the bank is the holder for a valuable consideration. And if the drawer's account be overdrawn at the time of discounting the draft and at its maturity, a court will not inquire into the amount checked out, but regard the consideration as good for the entire draft, *First Nat. Bank v. Crawford*, 2 Cin. S. C. Rep. 125.

be withheld on discovering that the maker does not have so much on deposit.

(a) *The City National Bank v. Burns*<sup>1</sup> is a noteworthy case. Hudson & Co. gave a check to Burns on the bank which was presented with the latter's indorsement for deposit. The cashier entered it as a deposit on the depositor's bank-book and placed it on the file of checks to be charged on the books of the bank to the drawers. Subsequently, Burns was credited on the books, and the drawers were charged with it. It was not the bank's course of business to receive for collection checks drawn on itself; nor were checks received by it for collection placed on the same file as this. In the afternoon of the day when the deposit in question was made Hudson & Co. failed, and on examining their account the check proved to be an overdraft. The bank immediately gave Burns notice, and offered to return it on the next day, but Burns declined to receive it and claimed that it was paid, and that the bank was liable to him for the amount as it would be for a similar deposit in money. Chief Justice Brickell said there was some contrariety of decision concerning the liability of a bank when a check drawn thereon was presented, and there was simply an entry of it to the credit of the holder on his bank-book as a deposit, whether it was to be regarded as paid or as received for collection. After saying that the check was not treated by the bank as it would have treated a check of which some other bank was the drawee, and in reference to which it would assume no other duty than that of collection, transferring to the credit of the holder only what might be derived from it, the mode of dealing with this check was just that which would have been adopted if it had not been an overdraft—if there had been funds in the possession of the bank, which were applicable to its payment. Contracts, agreements, transactions between parties should have operation and effect according to their intention, and it seems impossible from these facts to attribute

<sup>1</sup> 68 Ala. 267.

any other intention to the parties than that the check should be received by the bank and placed to the credit of the depositor, as cash, as money deposited by him. There can be no doubt that he was at liberty to draw for the amount of the check as money on deposit with the bank at any time before he was notified that liability for it was disavowed, and that his drafts in consequence would not be honored. Nor is there any room for doubt that at any time during business of the day of deposit his check would have been honored by the bank upon the faith of the deposit as money to his credit.

(b) *Cases reviewed.* "The case more nearly resembles and falls directly within the principle stated in *Bolton v. Richard*<sup>1</sup> that when a bank credits a depositor with the amount of a check drawn upon it by another customer, and there is no want of good faith upon the part of the depositor, the act of crediting is equivalent to a payment in money.<sup>2</sup> Nor can the bank recall or repudiate the payment, because, upon an examination of the accounts of the drawer, it is ascertained that he was without funds to meet the check, though, when the payment was made, the officer making it labored under

<sup>1</sup> 6 Term, 139.

<sup>2</sup> The cases of *Boyd v. Emmerson*, 2 Ad. & E. 184, and *Kilsby v. Williams*, 5 Barn. & Ald. 815, were referred to in the argument and by the court in the above case. In the first *Boyd*, who was a customer of a banking house, carried a check to it payable to himself, drawn by another customer, and left instructions to place the same to his credit in his account. The check was not cancelled or debited to the drawer or credited to *Boyd*. The bankers having made inquiries about the drawer, who had already overdrawn his account, gave notice to the plaintiff on the next day that the check would not be paid. It was held that a promise to pay the check could not be implied from these facts. Lord Denman said that the holder ought to have given distinct notice whether he presented it as a check to be paid or to be merely placed to his account like other securities. In the absence of such statement the inference was that the check was received in the latter character. This case was founded on the other in which a banker, receiving a check of which he was the drawee from a customer who did not expressly demand payment, was regarded as the agent of the customer for collecting it and bound only to the duties of such an agent, *Pollard v. Ogden*, 2 E. & B. 459.

the mistake that there were funds sufficient.<sup>1</sup> In the case last cited it was said: 'When a check on itself is offered to a bank as a deposit, the bank has the option to accept or reject it, or to receive it upon such conditions as may be agreed upon. If it be rejected, there is no room for any doubt or question between the parties. If, on the other hand, the check is offered as a deposit and received as a deposit, there being no fraud and the check genuine, the parties are no less bound and concluded than in the former case. Neither can disavow or repudiate what has been done. The case is simply one of an executed contract. There are the requisite parties, the requisite consideration, and the requisite concurrence and assent of the minds of those concerned.' And in *Oddie v. National Bank*, it was said by Chief Justice Church: 'When a check is presented to a bank for deposit, drawn directly upon itself, it is the same as though payment in any other form was demanded. It is the right of the bank to reject it, or to refuse to pay it, or to receive it conditionally, as in *Pratt v. Foote*,<sup>2</sup> but if it accepts such a check and pays it, either by delivering the currency, or giving the party credit for it, the transaction is closed between the bank and such party, provided the paper is genuine.' And further it was said: 'The bank always has the means of knowing the state of the account of the drawer, and if it elects to pay the paper, it voluntarily takes upon itself the risk of securing it out of the drawer's account or otherwise. If there has ever been any doubt upon this point, there should be none hereafter.'"

(c) *Oddie's case*. The Supreme Court of California<sup>3</sup> dissented from the conclusions of Church, C. J., in *Oddie v. National City Bank*, and declared that when a check on the same bank was presented by a depositor with his pass-book to the receiving teller, who merely received the check and

<sup>1</sup> *Chambers v. Miller*, 13 Com. B. N. S. 125; *Levy v. United States Bank*, 4 Dall. 234; *Oddie v. National Bank*, 45 N. Y. 735; *National Bank v. Burkhardt*, 100 U. S. 686.

<sup>2</sup> 9 N. Y. 463.

<sup>3</sup> *National Gold Bank v. McDonald*, 51 Cal. 64. See § 51 for fuller statement.

noted it in the pass-book, this did not of itself raise a presumption that the check was received as cash, but only for collection. The counsel for the depositor assumed that the mere fact of the receipt of the check by the receiving teller, and the entry of it in the depositor's pass-book, implied an agreement by the bank to accept it as cash, and was to be deemed in law as equivalent to the payment of the check. The proof showed that nothing more was done in that case. No entries were made on the bank books as was done in the Alabama case. The check was handed by the defendant's clerk to the receiving teller, together with the pass-book, without any remark, who, having made the entry, returned the book to the depositor. Does this transaction, inquired the court, of itself import an agreement by the bank to accept the check as cash. A negative answer was given. But in Oddie's case, previously mentioned, in which the facts were quite the same, the court decided otherwise. In that case the plaintiffs delivered to the receiving teller for deposit a check which was drawn by another depositor of the same bank. The receiving teller entered the check on the deposit ticket of the plaintiffs. "These facts," said Chief Justice Church, "are sufficient to sustain the conclusion of the referee that the defendants paid the check by receiving it as a deposit of money from the plaintiffs, and it is not material whether this is to be regarded as a conclusion of fact or of law." . . . "The plaintiffs clearly put in the check as a deposit, and the defendants as clearly received it as such, and credited the plaintiffs with it. The credit on the deposit ticket was as significant an act, evincing the consent of the defendants to the payment of it, as if made upon the pass-book of the plaintiffs, and entered upon the books of the bank. Financial business is transacted at banks, with great rapidity, but according to definite and certain rules, which are well understood and acted upon by those engaged in that business. Very little is said, but very much is understood, and there is an absence of all formalities which tend to embarrass the facility of doing the business. In determining the legal effect of such transactions, we

must apply the same rules applicable to all contracts and business affairs, and effectuate and carry out the intention of the parties to be gathered from their acts and declarations, and the accustomed and understood course of the particular business. Applying these rules, there can be no doubt but there was an express demand on one side, and consent on the other, that this check should be placed to the credit of the plaintiffs as a deposit. The legal effect of the transaction was precisely the same as though the money had been first paid to the plaintiffs, and then deposited."<sup>1</sup>

(d) *Usage in California.* The remark is in order concerning the California case that the usage existed among the banks in San Francisco to return checks drawn on the depository banks, and to cancel the credits in depositors' pass-books if the fact was ascertained within banking hours on the day of making deposits that the makers did not have enough funds to pay their checks. The rule of law, therefore, established by the court was in harmony with the well-known usage existing there, and is evidently just.

(e) *Rule in New Jersey.* The rule thus established in New York and Alabama prevails in New Jersey. In *Titus & Scudder v. Mechanics' Nat. Bank*,<sup>2</sup> which was a suit to recover the value of two checks, the court said, "They were received and credited in a cash account as cash, in part as payment of an overdraft, and in part to be drawn against. They were received and credited in the same way as bills or notes of other banks. By such crediting, the bank became the owners of these bills, as they do of legal tender notes or bank bills so deposited. And had the defendants failed the next day the plaintiffs could not have demanded these identical checks as their property, left for collection, against a receiver or an assignee in bankruptcy; the plaintiffs had received the price of these checks by having it credited on their overdraft, and by drawing for it. Any balance due to them

<sup>1</sup> *Market Bank v. Hartshorne*, 3 Keyes, 137; *Levy v. Bank*, 4 Dall. 234.

<sup>2</sup> 35 N. J. Law, p. 592.

from defendants would be paid like other creditors' demands, *pro rata*, out of the assets of the insolvent." And in more recent cases the same doctrine has been affirmed.<sup>1</sup>

§ 19. **The rule when the check is not drawn against funds.** Before passing to another question a distinction must be noted. When the drawer of a check has no funds in the drawee bank, and this is known to the holder, who, nevertheless, deposits it, and is credited for the amount, the transaction is not regarded as payment by the bank to the depositor, and no recovery can be had thereon. This distinction in no way weakens the rule that a check is cash which is credited to the depositor and charged to the maker, because it is a fraud on the part of the holder to present knowingly for deposit a check not drawn against funds.<sup>2</sup>

§ 20. **Ownership of check not drawn on the depository.** (a) *Metropolitan National Bank v. Loyd.*<sup>3</sup> The next question to be considered is, when the check or other instrument is not drawn on the depository, but on another bank. In the above case, which is often cited, it was decided that when a check is due and indorsed in blank, and deposited by the payee on general account and which is credited to him as cash, the bank has the title thereto, and in the event of non-payment can recover of the depositor only as an indorser. The decision was affirmed by the New York Court of Appeals, and the opinion of Judge Daniels, delivered in the court below, was regarded as very satisfactory.<sup>4</sup>

(b) *Opinion of New York Court of Appeals.* In a later case, Judge Andrews, in delivering an opinion for the same Court of Appeals, said, "The general doctrine, that upon a deposit being made by a customer in a bank, in the ordinary course of business, of money, or of drafts or checks received and credited as money, the title to the money, or to the drafts or checks is immediately vested in and becomes the property of

<sup>1</sup> *Terhune v. Bank*, 34 N. J. Eq. 367; *Hoffman v. First Nat. Bank*, 46 N. J. Law, 604.

<sup>2</sup> *Peterson v. Union Nat. Bank*, 52 Pa. 206.

<sup>3</sup> 25 Hun, 101.

<sup>4</sup> 90 N. Y. 530.

the bank, is not open to question. The transaction, in legal effect, is a transfer of the money, or drafts or checks, as the case may be, by the customer to the bank, upon an implied contract on the part of the latter to repay the amount of the deposit upon the checks of the depositor. The bank acquires title to the money, drafts or checks, on an implied agreement to pay an equivalent consideration when called upon by the depositor in the usual course of business."<sup>1</sup>

(c) *Opinion of Wallace, J., United States Circuit Court.* This question arose after the failure of the Marine Nat. Bank, of New York, in 1884,<sup>2</sup> in an action against the receiver by a railroad company to recover a draft which had been deposited with the bank on the 5th of May and was collected two days afterward. The bank was insolvent at the time of receiving it, and failed before completing the collection. "Upon principle," said Judge Wallace, "there is no reason why, if the parties choose to treat the deposit of such a paper as a deposit of cash, the transaction should not be deemed equivalent to a discount of the paper by the bank. Sight bills, drawn by one corporation upon another of prominent financial standing, like the interest coupons of such corporations, or like certified checks upon banks, are generally accepted in commercial usage as the equivalents of money. They have practically the same attributes as bills issued by banking corporations, which are merely promises to pay at sight, and are everywhere accepted as money, in the absence of special circumstances affecting

<sup>1</sup> *Cragie v. Hadley*, 99 N. Y. p. 133; *Ayres v. Farmers and Merchants' Bank*, 79 Mo. 421. A bank which receives an indorsed check and credits the amount to the depositor may recover the same if the check be dishonored when presented the next day, though the drawee has sufficient funds in the bank, but has stopped payment of them, *Hooker v. Franklin*, 2 Bosw. 500. If, as Judge Wallace remarked in *St. Louis & Co. v. Johnson*, 27 Fed. Rep. p. 243, "a bank does not wish to assume the relation of a debtor for the paper to the depositor, this intention may be manifested in a very explicit manner by crediting the paper as paper. This was done in *Thompson v. Giles*, 2 Barn. & Cr. 422, in the case of *Rowton*, 1 Rose, 15, and in the case of *Sargeant*, Id. 153."

<sup>2</sup> 27 Fed. Rep. 243.



the financial standing of the corporation issuing them. . . When a sight bill is deposited with a bank by a customer at the same time with money or currency, and a credit is given him by the bank for the paper just as a like credit is given for the rest of the deposit, the act evinces unequivocally the intention of the bank to treat the bill and the money or currency, without discrimination, as a deposit of cash, and to assume towards the depositor the relation of a debtor instead of a bailee of the paper. If the customer assents to such action on the part of the bank by drawing checks against the credit, or in any other way, he manifests with equal clearness his intention to be treated as a depositor of money, and, as such, as a creditor of the bank instead of a bailor of the paper. Under such circumstances it should be held that the bank acquires title to the paper just as it would to a deposit of money. The intention of the parties in the particular transaction may be ascertained from the course of their previous dealings. When it appears that it has been the uniform practice between the parties in their past dealings to treat deposits of paper as deposits of cash, their intention to do so in the particular transaction should be inferred, in the absence of new and inconsistent circumstances. It is quite certain that bankers do not invariably credit their customers for sight paper as for cash, but are generally influenced by the financial responsibility of the customer, or the drawee of the paper, or both. . . Some significance must be attached to a credit entry of the bill upon the books of the bank as cash, and the natural implication would seem to be that the bank by making such an entry, assumes to receive the bill as money. Correlatively, if the depositor understands that the bank proposes to receive the paper as money, and assents, expressly or by acquiescence, it would seem that he consents to part with the title to the paper. For these reasons the conclusion reached in *Metropolitan National Bank v. Loyd* are adopted as satisfactory. The authorities bearing upon the general questions are so fully cited and discussed in the opinions in

that case that it is deemed unnecessary for present purposes to refer to them."<sup>1</sup>

(d) *In Brooks v. Bigelow*,<sup>2</sup> a check was made in Massachusetts, which was payable to a resident of New York city,

<sup>1</sup> The judge further remarked that inasmuch as the proceeds of the draft had not become commingled with the other moneys of the bank when the defendant took possession of its assets, but were capable of identification, the plaintiff was entitled, if they were its property, to follow them into the hands of the receiver, and regain them, *Illinois Trust and Sav. Bank v. Smith*, 21 Blatchf. 275; S. C., 15 Fed. Rep. 858. The question, therefore, was whether the draft belonged to the plaintiff at the time it was paid by the drawee. If it did, the defendant did not acquire title to the money. If the transaction in controversy was equivalent to a discount of the draft, the bank acquired title to the paper; if it was not, the bank merely became the agent of the plaintiff to collect the proceeds. The facts in the case, as stated by Judge Wallace were: "For several years prior to the fifth day of May, 1884, the plaintiff kept an account with the Marine National Bank, of the city of New York, making deposits with and drawing checks upon the bank from time to time. On the fifth day of May, 1884, the plaintiff deposited with the bank a sight draft for \$17,835, dated that day, and drawn by the plaintiff upon the treasurer of the Atchison, Topeka & Santa Fe Railroad Company, of Boston, Massachusetts, which company was indebted to the plaintiff in the amount of the draft. The bank was insolvent at the time, but forwarded the draft to its collecting agent at Boston, and the amount was paid to such agent by the drawee on the seventh day of May, after the bank had failed and closed its doors. On several occasions during the time the plaintiff kept an account with the bank the plaintiff deposited similar paper at the same time with money, and the bank credited the plaintiff upon its books, and also upon the pass-book of the plaintiff, with the amount of such paper as a cash item. The plaintiff also entered the amount of such drafts in a memorandum of deposits kept in its check-book among cash items. The plaintiff has never drawn against the credits given for sight drafts, but never had occasion to do so. There was no express arrangement or understanding between the plaintiff and the bank that such deposits should be treated as cash. When the draft in suit was deposited, it was sent to the bank by a messenger boy, but the plaintiff's pass-book was not sent, having previously been left with the bank for the purpose of being written up. The amount of the draft was credited by the bank on its own books to the plaintiff as a cash item, but it was not entered in the pass-book of the plaintiff until after the failure of the bank, and then without the plaintiff's knowledge. The defendant, who is the receiver of the bank, had notice of the plaintiff's rights before the proceeds of the draft were paid over to him by the collecting agent at Boston." See §§ 384, 436.

<sup>2</sup> 142 Mass. 6.

and deposited in a bank there, where he had a general account. By agreement, all his checks drawn on banks in other places were passed to his credit on the day of deposit, but, if returned unpaid, were charged to his account. The bank was not his agent by the law of New York to collect the check, but became the owner, though having the right to charge it back to his account in the event of non-payment by the bank on which it was drawn. It was therefore held that the receiver of the bank could maintain an action to recover the check of the maker notwithstanding its suspension on the very day the check was deposited.

(e) *Sims v. United States Trust Co.*<sup>1</sup> Another interesting case is worth describing: Dr. Sims drew a check on the People's Bank directing it to "pay to the order of the United States Trust Company five thousand dollars" and gave it to his agent Crowell for deposit. After depositing the check with the trust company, Crowell received a certificate of deposit stating that it had received the money from him in trust for Sims, and would repay the same to Crowell, in trust or his assigns on the return of the certificate. Crowell having drawn the money on presentation and surrender of the certificate, and kept or spent the same, Dr. Sims's executor brought a suit against the trust company to recover the amount. The court said that "it would seem to be beyond cavil that the plaintiff should succeed for the reason that the check drawn by Dr. Sims was payable to it and not to any one else, and not to or for the credit of anybody else. It was a transfer in effect of the sum of \$5000 from the People's Bank of the city of New York, upon which the check was drawn, to the United States Trust Company and to the credit of the drawee, Dr. Sims, and no other person." Nevertheless the plaintiff could not recover and why? Because of "a well established commercial usage existing for many years throughout the United States, whereby banks and trust companies and other financial institutions, in the absence of a restrictive indorsement,

<sup>1</sup> 35 Hun, 533, Aff. by Ct. of Appeals, 8 Eastern Rep. 333.

accept as checks drawn to their order and deposit or apply the same as directed by the person presenting them. It is quite apparent," continued the court, "that the application of such a usage authorized the certificate in the form in which it was issued; Mr. Crowell having presented the check and being entitled, therefore, to the direction contained in it that it should be paid to him in trust or to his assignees."

§ 21. **The rule when the distinction between the two kinds of checks has not been observed.** (a) *In Alabama.* The distinction previously mentioned between deposits consisting of checks drawn on the depository and checks drawn on other banks has not always been judicially observed.<sup>1</sup> In the following cases the distinction was not mentioned; the checks, however, which formed the subject of controversy were not drawn on the depository. In the first of these the court declared that "in the absence of a special agreement when a check is deposited it is taken generally for collection by the bank as the agent of the depositor, and the bank does not owe the amount until its collection is accomplished. It may be that if it is passed to the credit of the depositor and mingled with the general funds of the bank it is, *prima facie*, a payment on deposit; but the bank may permit, as a matter of favor and convenience, checks to be drawn against it before payment, the depositor in the event of non-payment being responsible for the sums drawn—not by reason of his indorsement, the check not having ceased to be his property, but for money paid."<sup>2</sup>

(b) *In Pennsylvania.* In Pennsylvania notes, checks, and drafts received by one bank from another for collection are not considered as cash within the meaning of the banking law of 1850, whereby depositors become preferred creditors

<sup>1</sup> "A deposit being made by a depositor in a bank in the ordinary course of business, of money, or drafts or checks received and credited as money, the title to the money or drafts or checks is immediately vested in and becomes the property of the bank," *Ingraham, J., National Citizens' Bank v. Howard*, 3 How. Pr. N. S. p. 512.

<sup>2</sup> *National Com. Bank v. Miller*, 77 Ala. p. 173.

whenever such institutions pass into insolvency.<sup>1</sup> But when they are credited to a depositor as cash, and interest is paid on his balances, of which these form a part, they are regarded as deposits and the depositor is within the meaning of the law.<sup>2</sup> Moreover, they are presumed to be a cash deposit, and if received for the benefit of another this must be affirmatively proved.<sup>3</sup>

(c) *In Louisiana.* In Louisiana the Court of Appeals, whose decisions, however, are not final, declare that "checks, like drafts, bills, or notes, so deposited with a bank are placed for collection, and not sold, exchanged, or otherwise made the subject of a contract calculated to transfer title. It is hard to imagine any advantage which could exist, calculated to induce a bank to assume ownership and responsibility for such paper. The fact that owing to the short course such paper has to run these institutions usually permit their customers to draw against the amount of checks deposited, does not of itself alter the relations between the parties. The credit is only conditional and may be cancelled and the check returned should the latter be dishonored. The depositor remains owner of the paper and the bank merely the agent."<sup>4</sup>

<sup>1</sup> Parkesburg Bank's Appeal, Sup. Ct., 35 Leg. Int. 203; S. C., 6 Week. No. Cas. 394.

<sup>2</sup> Foulker v. Union Banking Co., Phil. Com. Pleas, 6 Week. No. Cas. 169.

<sup>3</sup> Gettysburg Bank v. Kuhns, 62 Pa. 88. Notes were left with a banker for collection; the guarantor paid them, and as a voucher for the transaction delivered to H. a certificate of deposit for the amount thus paid. In an action against the banker for taking the notes, the referee in the case was justified in finding that the certificate was a voucher; that H. had paid the money for the notes, and that the money paid was not a deposit, Hotchkiss v. Mosher, 48 N. Y. 478. See § 247, d.

<sup>4</sup> McGloin, J., Louisiana Ice Co. v. State Nat. Bank, 1 McGloin, p. 185. "It would seem that in London it was a custom (Giles et al v. Perkins et al., 9 East. 12, and counsel arguing in *Ex parte* Thompson, 1 Mont. & MacA. 102, 110) for bankers to receive bills for collection and to enter them immediately in their customers' accounts, but never to carry out the proceeds in the column to their credit until actually collected; and this was called a 'short entry,' or 'entering short.' And such bills always continued the property of the customer, unless the contrary was to be inferred from some course of dealing. Whereas country bankers in England generally credited to their cus-

§ 22. **Ownership retained by a restrictive indorsement.** If a depositor desire to retain the ownership and control of his check until payment, he can do so by indorsing thereon "for collection" or words of similar purport.<sup>1</sup>

§ 23. **Depositor is the owner unless credited for the amount.** On the other hand the depository cannot be required to assert ownership of the check or other instrument deposited in any case. The election to treat such a deposit as cash or for collection when received without instructions from the depositor, is purely voluntary. The bank, therefore, is not the owner before making the election. This may be done by express agreement, or by a course of dealing constituting a usage. Such a usage cannot be established by showing that the depositor constantly drew drafts against his remittances under an agreement by which he was allowed interest on his average balances.<sup>2</sup>

tomers at once all bills considered good, and generally allowed drafts upon the proceeds. And even in the latter cases Lord Ellenborough held such bills did not pass to the assignees in bankruptcy, if there was a balance in favor of the customer over and above the bills, *Giles et al. v. Perkins et al.*, 9 East. 12; *Ex parte Harford*, 2 Rose, 163. But Lord Eldon held that where they were with the knowledge of the customer entered as cash, and the customer was entitled to draw against them, he could not claim the specific bills, *Ex parte Sargeant*, 1 Rose, 153; *Ex parte Thompson*, 1 Mont. & MacA. 102. But even where the custom was to enter short and it was not done, this would not change the property, unless some act of the customer concurred, *Ex parte Sargeant*, 1 Rose, 153; *Ex parte Pease*, Id. 232; and the Vice-Chancellor's opinion in *Ex parte Thompson*, 1 Mont. & MacA. 102, 112," Potter, J., *Blaine v. Bourne*, 11 R. I. 119, p. 121. See Walker's Treatise on Banking Law, p. 196, and Grant, p. 144 and §§ 384, 436.

<sup>1</sup> *Hoffmann v. First Nat. Bank*, 46 N. J. Law, 604; *Cecil Bank v. Farmers' Bank*, 22 Md. 148; *Sweeny v. Easter*, 1 Wall. 166, § 278.

<sup>2</sup> See § 436. In *Scott v. Ocean Bank*, 23 N. Y. 289, Lyell (who afterward assigned to Scott) deposited a draft with the Ohio Life Ins. and Trust Company, which transferred the same as security for a precedent debt to the Ocean Bank. Lyell was a large depositor with the company and the debtor and creditor relation existed between them. Assuming this to be their true relation the judge at the first trial dismissed Scott's complaint, which was brought to recover the amount of the draft which had thus been transferred. But the Court of Appeals maintained a different view. It was not shown, so held the court, that the bill had been treated as cash by the company. "It

§ 24. **Deposit of an invalid check.** If the teller receive as cash an invalid check on another bank, and consent to take it as his own and look to the drawer for payment, he cannot return the check to the bank and make it responsible without its consent.<sup>1</sup>

§ 25. **Deposit of insolvent bank notes.** If at the time of receiving a deposit of bank notes the issuer of them is insolvent, or becomes so, and a loss is sustained, shall it be borne by the depositor or by the depository. A deposit of bank notes was made in a Delaware bank, and the next day it received notice of the failure of the issuer. In obedience to the action of the directors, the depositor was notified that the notes deposited by him would remain subject to his order, thus seeking to change the deposit from a general into a special one. The court, in a very elaborate opinion, declared that the risk of solvency was on the bank, and, consequently, that it must bear the loss if any were sustained. More formally expressed, the court declared that "when a bank note is given *bona fide* and received without objection, in exchange for goods, money, notes, or bills; or on general deposit by a

is more reasonable to assume that it would at least reserve the right to elect whether to give credit absolutely or not before the proceeds were realized; and until such election was made and credit was in fact given therefor, the bill would be held by it as the property of Lyell, and not its own. When, therefore, it appears that the bill in question was retained in the possession of the company after its acceptance, and that no credit had been given for it at the time it was passed to the defendants, and when nothing is declared in the whole course of dealings between the parties to show that any bill was ever credited or agreed to be credited in account before its collection or that Lyell ever drew or was entitled to draw upon the company or that it was bound to accept drafts otherwise than upon and for funds actually received in cash, it must be considered that the company at the time of the transfer stood in the relation of agents for its collection merely. There is no ground based on those dealings (and no other is claimed) for the conclusion that the ordinary relation of debtor and creditor between the company and Lyell in relation to the bill in question existed or that it had become as between them the property of the company. Lyell consequently continued to be the owner of it at the time of its transfer, and the defendants never acquired any right to it as against him or the plaintiff who had succeeded in his title."

<sup>1</sup> Union Bank v. Mackall, 2 Cr. C. C. 695.

bank, and there is no agreement or understanding, express or implied, between the parties as to which of them shall stand the risk of the then or future solvency of the bank issuing such note; the party thus receiving such note assumes all the risk of its solvency, and is without remedy against the person from whom he thus received it, although it may afterwards appear that the bank issuing such note had at the time of the transaction failed."<sup>1</sup> In New York a different rule had been previously established concerning the effect of paying the notes of an insolvent bank. Even if the parties were ignorant of the insolvency the payment would not be valid. Accordingly, a bank which had paid one-fourth of a two thousand dollar check in the notes of such a bank was required to repay that amount.<sup>2</sup> Both courts maintained the same rule on one point, and were opposed on another. When banks are solvent at the time of making use of their notes in payment, a loss from their subsequent insolvency must be borne by the payee; if insolvent at the time of making payment the courts disagreed.

<sup>1</sup> *Corbit v. Bank of Smyrna*, 2 Harring. 235.

<sup>2</sup> "The law is well settled, that where the note of a third person is received in payment of an antecedent debt, the risk of his insolvency is upon the party from whom the note is received, unless there is an agreement or understanding between the parties, either express or implied, that the party who receives the note is to take it at his own risk. The same principle is applicable to the notes of an incorporated bank, except that as to the latter there is always an implied understanding between the parties that if the bill at the time it is received, is in fact what the party receiving it supposes it to be, he is to run the risk of any future failure of the bank," *Chancellor Walworth, Ontario Bank v. Lightbody*, 13 Wend. 101, p. 104.



## CHAPTER III.

## AUTHORITY OF BANKS TO RECEIVE DEPOSITS.

§ 26. **Authority to receive special deposits.** As the receiving of general deposits is an essential feature of the banking business, no one has ever questioned the authority of these institutions to receive them.<sup>1</sup> But their authority to receive special deposits has been questioned on many occasions. It was in the well-known *Essex Bank* case.<sup>2</sup> Although its charter did not confer this power, and no regulation or by-law existed, the bank had a right to receive them. And "it is now well settled," says the Supreme Court of the United States "that if a bank be accustomed to take such deposits, and this is known and acquiesced in by the directors, and the property is lost by the gross carelessness of the bailee a liability ensues in like manner as if the deposit had been authorized by the terms of the charter."<sup>3</sup>

§ 27. **National banks can receive special deposits.** At one time, however, the Court of Appeals of New York<sup>4</sup> questioned the authority of the national banks to receive such deposits, and so did the Supreme Courts of Vermont<sup>5</sup> and Maryland.<sup>6</sup> These decisions, said Judge Upson, of the Supreme Court of Ohio<sup>7</sup> rested on the assumption that the Act under which

<sup>1</sup> The receipt of the cashier of the State Bank of Illinois for money received of an individual was held to be evidence of a deposit, and also that he had a right to receive it, *Bank v. Kain*, 1 Breese, Ill., 45.

<sup>2</sup> 17 Mass. 479.

<sup>3</sup> *First Nat. Bank v. Graham*, 100 U. S. p. 702, referring to many authorities; *Bank of Kentucky v. Schuylkill Bank*, 1 Pars. Eq. p. 235.

<sup>4</sup> *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278.

<sup>5</sup> *Wiley v. First Nat. Bank*, 47 Vt. 546; *Whitney v. First Nat. Bank*, 50 Vt. 388.

<sup>6</sup> *Weckler v. First Nat. Bank*, 42 Md. 581.

<sup>7</sup> *First Nat. Bank v. Zent*, 39 Ohio St. 105.

national banks are organized expressly set forth their powers and did not include among them power to receive special deposits, and that this was not given by the grant of all such incidental powers as should be necessary to carry on the business of banking. The proper construction of the Banking Act has been conclusively determined by the Supreme Court of the United States,<sup>1</sup> which has decided that the authority of a bank after its failure "to deliver special deposits," clearly implies that it may as a part of its legitimate business receive special deposits. The same view was expressed by the New York Court of Appeals in *Patterson v. Syracuse Nat. Bank*,<sup>2</sup> in which case Judge Rapallo reviewed all the decisions bearing on the subject.<sup>3</sup>

§ 28. **Receipt of deposits by an insolvent bank.** (a) *Can be recovered if made through fraud.* A bank ought not to receive deposits when in an insolvent condition. And when a deposit is taken under circumstances constituting a fraud on the depositor, he can recover the check or other instrument deposited, or the proceeds.<sup>4</sup> For the rule is, that one who has been induced to part with his property by the fraud of another under guise of a contract, on discovering the fraud may rescind the contract and reclaim the property, unless it has come to the possession of a *bona fide* holder. And this rule applies to all wrongdoers, whether corporations or natural persons.<sup>5</sup>

(b) *Or on a condition not fulfilled.* When money is received by an insolvent banker with the intention of returning it, if not succeeding in restoring himself to solvency, the depositor can recover it from the banker's assignee. On one occasion

<sup>1</sup> *First Nat. Bank v. Graham*, 100 U. S. 699.

<sup>2</sup> 80 N. Y. 82.

<sup>3</sup> See note in *Abbott's National Digest*, vol. 1, p. 330, for the names of all the cases.

<sup>4</sup> *Cragie v. Hadley*, 99 N. Y. 131. "A bank which is insolvent and contemplating suspension, and whose assets are far less than its liabilities acquires no title to a check deposited by one to whom its condition is unknown," *Fisse v. Dietrich*, Appendix, 3 Mo. App. 584.

<sup>5</sup> *Cragie v. Hadley*, 99 N. Y. 131; *Cragie v. Smith*, 14 Abb. N. Cas. 409; *National Citizens' Bank v. Howard*, 3 How. Pr. N. S. 511.

an insolvent banker who intended to make an assignment on a particular day unless assisted before its close did receive money from a depositor who was ignorant of his condition, which was entered in his book, and labelled with the depositor's name, and kept separately with the view of returning it in the event of assigning, and not entered in any other except a memorandum cash-book beneath which was written the depositor's name. Before the day closed, he did make an assignment for the benefit of his creditors, and delivered the deposit in question to the assignee with the request that he would, if he legally could, return it to the depositor. The request, with the sanction of the court, was executed.<sup>1</sup>

(c) *Or, perhaps, if the bank is ignorant of its insolvency.* Whether if a bank be insolvent, though ignorant of the fact at the time of receiving a check for deposit, the depositor can recover it, is an unsettled question. In New York he cannot.<sup>2</sup> In a recent case in a federal court, in which a depositor's check that had been credited to him was in possession of the depository at the time of its failure, the depositor was declared to be the owner instead of the receiver.<sup>3</sup> And the Supreme Court of New Jersey has favorably regarded this decision.<sup>4</sup> When, however, the check of a depositor has been credited to him, forwarded for collection, and also credited by the collecting bank, the depositor in the event of the failure of his depository, is not entitled to a preference over other creditors.<sup>5</sup>

(d) *Marine National Bank case.* This question was raised in the case against the receiver of the Marine National Bank, of New York, which has been previously reviewed. In reply to the question, Judge Wallace said that the case could not

<sup>1</sup> Chaffee v. Fort, 2 Lans. 81, the court citing Ash v. Putnam, 1 Hill, 302; Atkin v. Barswick, 1 Strange, 165.

<sup>2</sup> Metropolitan Nat. Bank v. Loyd, 25 Hun, 101; *In re Bank of Madison*, 5 Biss. 515.

<sup>3</sup> Balbach v. Frelinghuysen, 15 Fed. Rep. 675.

<sup>4</sup> Hoffman v. First Nat. Bank, 46 N. J. Law, p. 607.

<sup>5</sup> Terhune v. Bank, 34 N. J. Eq. 367.

be considered on that theory because the bill contained no allegation "that the officers of the bank entertained any fraudulent intention towards the plaintiff in receiving the paper, and the bill does not proceed upon such a theory. If the officers of the bank supposed the institution would be able to maintain its credit and thus surmount its difficulties, they were under no legal duty to the plaintiff to disclose the state of its affairs."<sup>1</sup>

§ 29. **Authority to receive contingent deposits.** Concerning these, if a deposit be made not for the sole benefit of the depositor, but also in a certain contingency for the benefit of a third person, it can be received. Moreover, a bank which is authorized to receive deposits has a right to receive the deposit of a fund in controversy to abide the event of a litigation or award, or to become payable on a contingency to some other person than the depositor. So long as a bank undertakes nothing more than to pay over money deposited with it to the person who may by the conditions on which the deposit is made become the owner, it does not transcend its powers. Nor can it make any difference that the portion of the sum deposited which may become payable to a third person is at the time of the deposit uncertain and subject to liquidation. Until ascertained, the bank can hold the fund, and can also require before payment to have the amount liquidated in such a manner as to bind all parties.<sup>2</sup>

<sup>1</sup> 27 Fed. Rep. p. 246.

<sup>2</sup> *Bushnell v. Chatauqua Co. Nat. Bank*, 74 N. Y. 290.

## CHAPTER IV.

## DEPOSITS AFTER BANKING HOURS.

§ 30. **The rule must be reasonable about receiving them.** When a deposit is made after banking hours, and it is entered like other deposits, the relations between bank and depositor are not changed. But these relations may be changed by treating the deposit in a different manner. Thus in *Sadler v. Belcher*<sup>1</sup> it was shown that the custom of the London banks was to put the money paid after banking hours into a separate place of deposit, and enter it in a different book called a counter-book, and to carry it to the customer's account the next day. Accordingly, the depositor in this case having paid in a bank of England note after banking hours, which was put in a separate place of deposit and was not carried to the account of the depositor, he was declared to be the rightful owner of the same in a suit against the assignee of the banker. But in another case of a deposit after banking hours in which the bankruptcy did not occur till the next day, the court, assuming that the deposit was cash and payable on demand, declared that it would pass to the assignees.<sup>2</sup> It may be added that while a bank may fix hours for receiving deposits "this power," said the court in *Wisconsin*, "is not an absolute or arbitrary one. The rules prescribed and the hours of business designated must be reasonable, and adapted to the exigencies of the particular kind of business, in reference to which they are established, as well for the safety and convenience of the public as for that of the bank. While it is proper and necessary for the general convenience of all parties that certain hours shall be named

<sup>1</sup> 2 Moo. & Rob. 489.<sup>2</sup> *Ex parte Clutton*, 1 Fonbl. 167.

within which the bank will receive deposits, pay bills and drafts, discount notes, etc., it is neither reasonable nor proper that the same hours shall be designated for the transaction of its other business." Hence, as the receiving or delivery of packages is not a matter peculiar to the banking business, a bank has no more right to declare or insist that it will receive no packages from an express company "after what it pleases to call 'banking hours,' than has any merchant, warehouseman, or wharfinger a right to decline the reception of a valuable package of goods after a certain hour, and in that manner thrust upon the carrier a further continuance of his extraordinary responsibility."<sup>1</sup>

<sup>1</sup> *Marshall v. American Express Co.*, 7 Wis. 1, p. 24.

## CHAPTER V.

## TO WHAT OFFICER DEPOSITS SHOULD BE MADE.

§ 31. **Delivery of money.** (a) *Delivery to cashier, teller, or porter is delivery to bank.* A package of money directed to the cashier of a bank is in law directed to the bank itself, and a delivery of the same to the assistant teller during banking hours, at his place behind the counter of a bank is a legal delivery.<sup>1</sup> So the delivery of a package of money to the porter of a bank either there or at the express office, or clearing-house—places where he is accustomed to receive it—is a good delivery.<sup>2</sup>

(b) *In Sweet v. Barney,*<sup>3</sup> the money package was delivered to the porter of the People's Bank at the express office. It was addressed, "People's Bank, 173 Canal Street, New York." It was proved that for many years the porter had been in the service of the bank, that he was accustomed to receive money brought by the express company at the bank, at the clearing-house, and at the express office. He was also accustomed to act for the bank in making exchanges and collections, and as its representative in the clearing house, at a desk labelled "People's Bank," and had often received packages of money from the defendants addressed to the People's Bank. Other packages for the bank had been delivered to the porter within a few days previously without objection from any official. The package was stolen from the porter after its delivery to him. This was a complete delivery to the bank.

(c) *To what officer a note can be paid.* Though going beyond the province of our work, it may be added that if one

<sup>1</sup> Hotchkiss v. Artisans' Bank, 2 Keyes, 564; S. C., 2 Abb. App. Dec. 403.

<sup>2</sup> Sweet v. Barney, 23 N. Y. 335.

<sup>3</sup> Id.

were indebted to a bank and should pay the debt to an officer over its counter without knowing he was not authorized to receive the money, the payment would bind the institution. "It would be a very inconvenient and unreasonable rule to hold that a bank was not bound by such a payment. . . Banks must be held responsible for the conduct of their officers within the scope of their apparent authority. When one goes into a bank and finds behind the counter one of its officers employed in its business, and upon his demand pays a debt due the bank in good faith, without any knowledge that the officer's authority is so limited that he has no right to receive it, he must be protected, and the bank must be bound by the payment."<sup>1</sup> In Gove's case the controversy related to an alleged payment by him to the bank in discharge of an over-payment. Beside other officials, the bank had a paying teller and a receiving teller, and Gove paid his money to the former. There was no proof that the receiving teller was in the bank at the time he made payment. "There was no proof that the paying teller was not, in fact, authorized to receive this money." He was, indeed, not accustomed to receive money from depositors. But this payment was not a deposit; it was a debt due to the bank. Under these circumstances the court held that the payment to the paying teller was a good payment to the bank.

<sup>1</sup> Earl, C., *East River Nat. Bank v. Gove*, 57 N. Y. 597, p. 601. See *McCann v. State*, 4 Neb. 324, p. 335.



## CHAPTER VI.

NATURE OF A DEPOSITOR'S CONTRACT—WHEN IS A BANK DEBTOR  
AND WHEN AGENT OF A DEPOSITOR.

§ 32. **Need not be received.** A bank is not required, like a common carrier, to receive deposits regardless of its wish. Said Judge Sanford: "A bank is not bound to receive on deposit, or to keep, the funds of every man who offers money for that purpose. It may select its dealers and refuse such as it pleases. For the purposes of this selection the cashier appears to be the proper officer."<sup>1</sup>

§ 33. **A deposit is generally regarded as money.** Although the money deposited with a bank ceases to belong to the depositor and the obligation is, not to return the identical money, but the equivalent, in popular phrase persons speak of their money at the bank, and this is sufficient to transfer it by will to another. Thus the phrases, "all my ready money;"<sup>2</sup> and in another will, "ready money;"<sup>3</sup> and in another "to my wife all my ready money at my banker's, in my dwelling house or elsewhere;"<sup>4</sup> transferred the cash balances in the possession of the bankers of the different testators to the legatees mentioned in their wills. So, too, money at a bank belonging to the trade account of a trader passed under a will by the words, "all my stock in trade;"<sup>5</sup> also the balance in favor of a testator from a banker by the words "all the debts due to me;"<sup>6</sup> and in another case by the words "moneys in hand;"<sup>7</sup> and in another "all my moneys."<sup>8</sup>

But money in the possession of a testator's salesmaster did

<sup>1</sup> *Thatcher v. Bank*, 5 Sand. p. 130.

<sup>2</sup> *Parker v. Marchant*, 1 Phil. (N. C.) 356.

<sup>3</sup> *In re Powell, Johns*. 49; S. C., 5 Jur. N. S. 331.

<sup>4</sup> *Fryer v. Ranken*, 11 Sim. 55.

<sup>5</sup> *Stuart v. Earl of Bute*, 3 Ves. Jr. 212.      <sup>6</sup> *Carr v. Carr*, 1 Mer. 541.

<sup>7</sup> *Vaisey v. Reynolds*, 5 Russ. 12.

<sup>8</sup> *Jenkins v. Fowler*, 63 N. H. 244.

not pass by will by the phrase "all his ready money and securities for money," because there was no evidence that the salesmaster acted as the testator's banker.<sup>1</sup> But in a contract dissolving a partnership, the phrase "accounts due" the firm, included a balance due from a bank.<sup>2</sup>

§ 34. **Debtor and creditor relation exists between bank and depositor.** Having received a deposit the relation of debtor and creditor is created. Perhaps no one has better stated the law than Mr. Justice Davis, in the case of the *Bank of the Republic v. Millard*.<sup>3</sup> "The relation of banker and customer, in their pecuniary dealings, is that of debtor and creditor. It is an important part of the business of banking to receive deposits, but when they are received, unless there are stipulations to the contrary, they belong to the bank, become part of its general funds, and can be loaned by it as other moneys. The banker is accountable for the deposits which he receives as a debtor, and he agrees to discharge these debts by honoring the checks which the depositors shall from time to time draw on him. The contract between the parties is purely a legal one, and has nothing of the nature of a trust in it. This subject was fully discussed by Lords Cottenham, Brougham, Lyndhurst, and Campbell in the House of Lords, in the case of *Foley v. Hill*,<sup>4</sup> and they all concurred in the opinion that the relation between a banker and customer, who pays money into the bank, or to whose credit money is placed there, is the ordinary relation of debtor and creditor, and does not partake of a fiduciary character, and the great weight of American authority is to the same effect." More than thirty years before Judge Cowen had said that "the bank takes money in the nature of a gratuitous loan, and charges itself with a debt absolutely due to the depositor."<sup>5</sup>

<sup>1</sup> *Smith v. Butler*, 3 J. & L. 565; *De Roebeck v. Lord Cloncurry*, 5 Ir. Eq. 588.

<sup>2</sup> *Burress v. Blair*, 61 Mo. 133.

<sup>3</sup> 10 Wall. 152.

<sup>4</sup> 2 H. L. Cas. 28.

<sup>5</sup> *Commercial Bank v. Hughes*, 17 Wend. p. 100. "Whenever a deposit is made in bank the relation of debtor and creditor is established between the

(a) *Deposit payable to non-depositor.* If money is deposited with the understanding that all checks shall be drawn to the order of a non-depositor, does the debtor relation between bank and depositor exist? Thus the action of both husband and wife was requisite to draw a deposit under the directions given to the bank when the deposit was made, and the court said "it was a question of fact under all the circumstances whether the money was understood to be deposited for [the use of the wife of the depositor or for his use, or for] the joint use of the two who were to act in drawing it out."<sup>1</sup>

§ 35. **Sometimes the relation is fiduciary.** (a) *When is a bank debtor and when agent.* Whether the relation between bank and depositor be that of debtor and creditor, or a fiduciary one, is sometimes difficult to determine, and very important to the parties to the controversy. This was the principal question in the litigation between the Marine Bank of Chicago and the Fulton Bank of New York.<sup>2</sup> The Marine Bank addressed a circular to its correspondents, informing them that, in consequence of the derangement then existing in the currency of Illinois, it would be compelled to place all funds received in payment of collections to their credit in such currency as was received in that city—bills of the Illinois stock banks—to be drawn only in similar bills. The Fulton Bank, for which a collection was made, received the notice. At the time of making it the bills were from five to ten per

bank and the depositor. The identity of the particular money deposited is lost and the relation between the parties continues the same, whether it is an ordinary or time deposit," *Williams v. Rogers*, 14 Bush, p. 788. A deposit is a loan and not a bailment, *Robinson v. Gardiner*, 18 Gratt. 509. A deposit with a bank of bank bills by a person constitutes "the former the debtor of the latter to the amount of the deposit, creating an obligation to pay upon the demand, or upon the check of the latter without interest. Such a deposit is a gratuitous loan, and it makes the depositor a creditor and the depository a debtor," *Wray v. Tuskegee Ins. Co.*, 34 Ala. p. 63.

<sup>1</sup> *Detroit Sav. Bank v. Burrows*, 34 Mich. 153; the court citing *Lilly v. Hays*, 5 Ad. & E. 548; *Malcolm v. Scott*, 6 Hare, 570; *Gibson v. Minet, Ry. & M.* 68; S. C., 1 Car. & P. 247, § 146.

<sup>2</sup> 2 Wall. 252.

cent. below par, but when the Fulton Bank demanded payment of the collection, a year afterward, the bills had declined fifty per cent. in value. It insisted that it was entitled to the value of the bills at the time they were received by the Chicago bank, while the bank claimed it was not obliged to pay only their value in coin at the time payment was demanded, with interest. Judge Miller, who delivered the opinion of the court, said that, "if the Marine Bank had received the depreciated money, and kept it without using it until called for, or had sent it by express to the plaintiff it would have been relieved from further liability. In other words, so long as the defendant retained strictly the character of agent, and acted within the principle laid down in the circular, it was protected." But instead of doing this the Marine Bank changed the relation of principal and agent into the ordinary one of debtor and creditor, by using the money as a general deposit. Hence the bank was declared liable for the depreciation in the bank bills received during the period it kept the deposit.

(b) *Change of relation in the same transaction.* As the Marine Bank was the agent of the other in collecting the note, the question was raised, could it act in any other way than as agent in keeping, using, and delivering the money? Could it, without the consent of the Fulton Bank, change its relation of agent after making the collection to that of debtor, thus treating the Fulton Bank like a general depositor? In reply to this question, the court said that both parties understood that when the money was collected the Fulton Bank was to have credit with the Marine Bank for the amount of the collection, and that the latter would use the money in its business. Consequently, the Marine Bank was guilty of no wrong in using the money, because it had become its own. It was used by the bank in the same manner that it used the money deposited with it that day by city customers; and the relation between the two banks was the same as that between the Chicago bank and its city depositors. As a bank, therefore, in some cases can change its agency-relation to that of a

debtor, it may be an important question sometimes which relation shall be assumed. In the foregoing case, as we have seen, had the Chicago bank continued its agency-relation after making the collection, its liability would have been greatly lessened. Had it kept the money received, its liability would have been discharged whenever it delivered the same to the New York bank.<sup>1</sup>

(c) *St. Louis v. Johnson*.<sup>2</sup> Another case is worth describing. The city of St. Louis and the receiver of the National Bank of the State of Missouri respectively claimed a balance in the possession of the Bank of the Republic of New York, which had been deposited there by the Missouri bank, at the request of the city of St. Louis, a depositor, to pay coupons and bonds owing by the city. More fully stated, the practice was for the city treasurer to draw a check on the Missouri bank for the amount necessary to be placed in New York to meet the indebtedness of the city there, and indorse the check and deliver it to the bank with written instructions to remit the amount to the New York bank for the purpose mentioned. The Missouri bank would then remit the amount specified to the New York bank with written instructions to pay such indebtedness, and to charge the same to the general account of the Missouri bank, and to cancel and forward the coupons and bonds paid. It should also be added that the Missouri bank was the depository of the city, and no question was raised concerning the general relation of the bank to the city, which was that of debtor and creditor. But in remitting to New York for the purpose explained, Judge Dillon said, that "the bank charged the city with exchange on the amount it thus received, the same as it would have charged if the draft had been for any other customer. It became the agent of the city to transmit the money. The money, when placed in the Bank of the Republic, was, as between the Missouri bank and the city, the money of the latter. When the agent presented coupons cancelled, this

<sup>1</sup> *Phoenix Bank v. Risley*, 111 U. S. 125.

<sup>2</sup> 5 Dill. 241.

showed that the agent had discharged the duty it had undertaken. It is my judgment that the relation between the Missouri bank and the city, as respects the money deposited with the Bank of the Republic, was not that of debtor and creditor strictly, but that of principal and agent, with the duties and liabilities of the latter, and not those of the former relation. The moneys deposited by the Missouri bank in its name with the Bank of the Republic, were, as between the former bank and the city, trust-moneys, and in equity they belong to the city."

§ 36. **Must the order to pay be in writing.** The depositor may order his money "to be paid to himself or anybody else, or he may order it to be carried over or transferred from his own account to the account of another person as he pleases." "He may do so by a written instrument, and I know nothing," said the Master of the Rolls, in *Watts v. Christie*,<sup>1</sup> "to prevent his doing so by a verbal direction, except this, that the bank may require some written evidence of this order to transfer; and I believe there is no necessity for giving a written instrument, except for the purpose of evidence." In *McEwen v. Davis*,<sup>2</sup> Judge Downey said that "when money is deposited with a banker it is payable on demand, at the bank, unless some other agreement has been made with reference to its payment. The banker is not required to hunt up the depositor and pay him the money as an ordinary debtor is bound to do with his creditor. The banker may pay the money upon an oral order, or transfer it from one account to another, and such oral order will be a sufficient authority and justification for so doing. But though the banker may, if he choose, act upon such oral direction, he is under no obligation to do so. By the usages of the banking business he is entitled to demand some written evidence of the order and the payment. A receipt would, of course, be evidence of such payment, and so the check of the depositor will, when

<sup>1</sup> 11 Beav. p. 551.

<sup>2</sup> 39 Ind. p. 111.

paid and in the hands of the banker, be evidence of the order to pay and also of the fact of payment."

§ 37. **How depositor's account is kept.** "Every regular dealer with a bank," says Chancellor Walworth, "has an open running account upon the books of the institution. In this account he is credited with all sums paid by him into the bank, whether the same are in specie, in checks, or in bills, on the same or other banks. In that account he is also credited with the proceeds of bills or notes discounted or collected for him; and in the same account he is charged with all checks drawn by him on the institution, in favor of himself or others, and with all other claims which are properly chargeable against him by the bank. If there is a balance due to the bank on this account, it is called an overdrawn, and the aggregate of balances due from the bank on these several accounts is entered in the statement-book as the amount of deposits."<sup>1</sup>

§ 38. **Closing bank account.** "If the banker finds the depositor a troublesome customer, so that the account is not a desirable one, he may tender the full amount of the deposit and refuse to receive more and thus close the account; and after that, if the depositor should receive the money, his right to draw out the deposit in parcels would be terminated, unless, perhaps, there might be an exception in favor of a *bona fide* holder of his check."<sup>2</sup>

§ 39. **Bank should credit the right person.** The deposit should not be credited to the wrong person. This is sometimes done. Thus two persons entered a bank at the same time, the one with and the other without money. The latter informed the cashier that the deposit was to be made on his account. The other said nothing for he was deaf and did not hear the remark. It was held that the bank ought not to have credited the deposit to him without further

<sup>1</sup> *In re Franklin Bank*, 1 Paige, p. 254.

<sup>2</sup> *Chicago Marine and Fire Ins. Co. v. Stanford*, 28 Ill. 168; *Munn v. Burch*, 25 Id. 35.

inquiry, and though innocent in intention must suffer for the loss to the deaf depositor, through the application of the familiar and just principle that "where one of two innocent persons must suffer by the act of a third, he who has enabled such third person to occasion the loss must sustain it."<sup>1</sup>

§ 40. **Deposit is presumed to belong to depositor.** (a) *Account in name of husband and wife.* The law presumes that a deposit belongs to the person in whose name it is entered; and if a deposit be claimed by another, the burden of proof is on him to establish his ownership.<sup>2</sup> And if a bank account be in the names of husband and wife, each drawing and depositing money in the absence of the other, the law presumes that each is the owner of one-half of the deposit.<sup>3</sup>

(b) *Bank cannot question its ownership.* A bank cannot question the ownership of deposit.<sup>4</sup> An attaching creditor or the true owner can, but not the bank.<sup>5</sup> Accordingly, in a suit by a depositor against a bank for the balance to his credit, it was not permitted to prove that the depositor was the clerk of a firm, that the money was deposited by him and in his name for its convenience, and that he declared so when he made deposits. Nor could the bank prove the indebtedness of the firm to it in order to lay the foundation for a set-off against the deposit.<sup>6</sup> Likewise, in an action against a savings bank by the assignee of a depositor to recover a deposit, it cannot defend on the ground that the deposit is derived from the sale of securities belonging to third parties, and which is claimed by them as their property. "It can never be permitted," said the Court in another case, "that a debtor may volunteer the protection of the claims of those

<sup>1</sup> *Winter v. Bank of New York*, 2 Cai. 337. See § 50.

<sup>2</sup> *Egbert v. Payne*, 99 Pa. 239.

<sup>3</sup> *Gelster v. Syracuse Sav. Bank*, 17 Week. Dig. 137.

<sup>4</sup> *Tassell v. Cooper*, 9 Man. Gr. & S. 510; *Graham v. Williams*, 21 La. Ann. 594. See § 129.

<sup>5</sup> *German Bank v. Himstedt*, 42 Ark. 62; S. C., second trial, 46 Id. 537.

<sup>6</sup> *First Nat. Bank v. Mason*, 95 Pa. 113.



with whom he has had no dealings to defeat his liability for the performance of his contracts.”<sup>1</sup> “A banker is bound to honor an order of his customer with respect to the money belonging to that customer which is in the hands of the banker, and it is impossible for the banker to set up a *jus tertii* against the order of the customer, or to refuse to honor his draft, on any other ground than some sufficient one resulting from an act of the customer himself. Supposing, therefore, that the banker becomes incidentally aware that the customer, being in a fiduciary or a representative capacity, meditates a breach of trust, and draws a check for that purpose, the banker, not being interested in the transaction, has no right to refuse the payment of the check, for if he did so he would be making himself a party to an inquiry as between his customer and third persons.”<sup>2</sup>

(c) *Duty of a bank when a fiduciary depositor meditates a breach of trust.* The duty of a bank whenever a fiduciary depositor meditates a breach of trust was further considered by Judge Hammond in an important federal case.<sup>3</sup> “A bailee without hire, as by a special deposit, is unquestionably in some degree less bound to look after the conduct of a fiduciary bailor than a banker having a general deposit for a like trustee. The circumstances under which a liability like that claimed here will arise against the latter is stated in *Gray v. Johnston*; and attention is there called to an important element in the consideration of such cases, which is: that a banker cannot question the right of his customer by refusing to honor his demands by check or otherwise, upon any theory that it is the banker's duty to look after the appropriation of the trust funds when withdrawn from the bank, and to protect the trust by setting up a *jus tertii* against the demand. This case goes further than any I have found, in some of its expressions, to justify the contention that mere knowledge of

<sup>1</sup> *Lund v. Seamen's Bank*, 37 Barb. 129.

<sup>2</sup> Lord Westbury, *Gray v. Johnston*, L. R., 3 H. L. Cas. p. 14.

<sup>3</sup> *Walker v. Manhattan Bank*, 25 Fed. Rep. 247, p. 255. See § 107.

the banker that a breach of trust is intended, makes him privy to it and liable. But, on scrutinizing the cases cited, it will be found that participation in the profits of the fraud is, generally speaking, an element in the case; and a 'mere reason to believe that the trustees were misapplying the assets' will not make the banker liable; for 'this would be to make every trustee accountable for his conduct in the trust to every agent whom he happened to employ, and would carry the principle of constructive trust to an inconvenient, and, indeed, to an impracticable length.'"<sup>1</sup> These reasons apply with greater force to a mere special deposit.<sup>2</sup>

§ 41. **Deposit should not be transferred without authority.** Money should not be transferred from one account to another without ample authority. Nevertheless, on many occasions has a third person attempted to subject a bank on an agreement supposed to exist between it and the depositor. The attempt of checkholders to sue the drawee bank is a good illustration. The above proposition would seem to be too plain for statement, yet the following case occurred: A. sent money to a bank in the form of a draft to be placed to his credit. Afterward A. agreed with B. to transfer the amount to the latter's credit, but did not notify the bank of the agreement. B., however, without authority from A., wrote to the bank ordering it to make the transfer, which was done. At a later date A. demanded his money, and of course the bank was obliged to pay.<sup>3</sup>

(a) *What is sufficient authority.* What authority will justify a transfer is a question of fact to be answered whenever it shall arise. When a person deposited money in a bank, and soon afterward, before the deposit was credited to him on its books, directed the cashier to credit another person with the deposit, which was done, and who subsequently drew the money, the authority for making the transfer was deemed ample.<sup>4</sup>

<sup>1</sup> Keane v. Robarts, 4 Madd. 332, 357.

<sup>2</sup> Trefftz v. Cannelli, L. R., 4 P. C. 277; Giblen v. McMullen, L. R., 2 P. C. 317; *Ex parte Davies*, L. R., 19 Ch. Div. 86.

<sup>3</sup> Coffin v. Henshaw, 10 Ind. 277.

<sup>4</sup> Neff v. Greene County Nat. Bank, Mo. Sup. Ct., 6 Western Rep. 455.

§ 42. **Relation of bank to depositor is a question of fact.** Although the usual relation existing between bank and depositor is that of debtor and creditor, it may become, as we have seen, a trustee, factor, or other agent of the depositor. The existence of this relation, instead of the ordinary one of debtor and creditor, is a question of fact to be determined by the conduct of the parties in each case. The question has arisen most frequently in making collections, or in cases of bankruptcy. The answers, therefore, may be more appropriately reserved for the chapters on those subjects.

§ 43. **Agency relation does not affect depositor's liability to others.** It may be added here, though, that in using a bank as an agent to pay bills, or to perform similar services, the depositor does not change his liability to his debtors. Thus it was a usual thing for a particular bank to pay all of the claims of a depositor sent for collection from his deposits, if he had any, charging the payments in the account. A special claim having been sent for collection, the customer deposited money for this purpose. The bank failed before thus applying the money, and the customer having being sued, he defended on the ground that he had already paid it. But the court decided that it was the depositor's duty to make payment, and the default of his agent, the bank, was no protection to himself.<sup>1</sup>

§ 44. **Ownership of money deposited for a special purpose.** When money is deposited for a special purpose, for example, the payment of a particular check, the question has arisen, to whom does the deposit belong, to the depositor or to the person who is to receive the money. In *Mayer v. Chattahooche Nat. Bank*,<sup>2</sup> the court remarked that the only question there could be in that case was "whether these deposits, made as each was for a special purpose, and under an express

<sup>1</sup> *Moore v. Meyer*, 57 Ala. 20.

<sup>2</sup> 51 Ga. 325, the court citing *Owen v. Bowen*, 5 Car. & P. 93, 96; *Cobb v. Becke*, 6 Q. B. 930; *Surtees v. Hubbard*, 4 Esp. 203; *Wharton v. Walker*, 4 Barn. & Cr. 163.

agreement between the debtor and the bank that they were made and received to pay certain specified checks which the debtor had drawn or would draw, continued the property of the debtor. The case in *Pace v The Trustees of Howard College*,<sup>1</sup> it seems to us, settles this question. It was there held that the deposit continued the property of the depositor until the bailee paid or promised the person for whose use it was deposited to pay it. And this is undoubtedly the general rule."

§ 45. **Interest on deposits.** Save by special agreement, banks do not pay interest on deposits. But if a bank receive money, agreeing to pay the same "forthwith" to the owner, and instead of doing so mingles the money with its common fund and derives a profit from its use, it must pay like trustees, administrators, guardians, and other agents, the usual rate of interest accruing and received.<sup>2</sup> After a deposit has been demanded interest accrues so long as it is unpaid.<sup>3</sup>

<sup>1</sup> 15 Ga. 486.

<sup>2</sup> *Parsons v. Treadwell*, 50 N. H. 356. the court citing *Dodge v. Perkins*, 9 Pick. 368; *Griswold v. Chandler*, 5 N. H. 497; *Stearns v. Brown*, 1 Pick. 531; *Wendell v. French*, 19 N. H. 213; *Stark v. Gamble*, 43 Id. 468; *Peirce v. Rowe*, 1 Id. 182. See §§ 133, 329.

<sup>3</sup> *Parkersburg Nat. Bank v. Als*, 5 W. Va. 50.

## CHAPTER VII.

## PASS-BOOKS.

§ 46. **How far are pass-book entries binding.** After depositing his money the depositor receives a book which is called a pass-book, bank-book, or deposit-book. This contains a record of the receipt and payment of his deposits. The legal principle concerning these books converge around two points: first, how far are the entries in them binding and conclusive on both parties and when should errors be reported; and, second, how effectually does the presentation of such a book by a savings bank depositor authorize the payment of deposits to the presenter under the regulations established by those institutions. The principles that relate to the first point will be considered here, the others will be found in another chapter.<sup>1</sup>

§ 47. **Original entry.** Formerly, if a bank officer entered a deposit on the pass-book at the time it was made, the entry was original, and binding on the bank, but if the entry was by copying from the ledger or from other bank-books it could be examined.<sup>2</sup> Such an entry, however, was not binding on the depositor, because the person making it was not his agent. Accordingly, if the depositor proved that an entry was incorrect, he could recover for the amount not credited to him.<sup>3</sup> And if a bank disputed the amount, it must show what the true amount was.<sup>4</sup> Nor would a by-law or rule of a bank, declaring that all payments must be examined at the time, prevent a depositor from showing afterward that there was a mistake in his account of deposits and receipts.<sup>5</sup> Though a

<sup>1</sup> Chapter V. §§ 199-203.    <sup>2</sup> *Manhattan Company v. Lydig*, 4 Johns. 377.

<sup>3</sup> *Mechanics and Farmers' Bank v. Smith*, 19 Johns. 115.

<sup>4</sup> *Asher v. National Park Bank*, 7 Alb. L. J. 43.

<sup>5</sup> *Id.*

bank possessed power by an act of incorporation to direct and prescribe the management and disposition of its money, stock, and other property, this did not confer the right to make by-laws or other regulations to defeat the rights of third parties.<sup>1</sup>

(a) *What books contain original entries.* A cash-book and a depositor's balance book belonging to a bank which have been fairly and correctly kept, in which after banking hours the various items of money deposited and drawn out during the day are copied from tags and checks containing the proper date of each transaction, are admissible in evidence as books of original entry.<sup>2</sup>

§ 48. **Accounts are open to examination if pass-book has been settled.** The rule now is, the rights of neither party are changed by settling a pass-book. The accounts are "open to examination and correction."<sup>3</sup> On one occasion a depositor called on a bank as soon as his book was returned and complained because it had paid a check contrary to his direction, and brought a "suit at no very considerable period afterwards" to recover the amount. The court did not think he had "acquiesced in the account as claimed by the bank."<sup>4</sup> So, if an account is rendered and received by a depositor without knowing its contents, his acquiescence will not prevent him from disputing it.<sup>5</sup>

(a) *Opinion of the United States Supreme Court.* "Mistakes in bank accounts," remarked Judge Hunt, in the case of the *First Nat. Bank v. Whitman*,<sup>6</sup> "are not uncommon. They occur both by unauthorized or pretended payments, as well as by the omission to give credit for sums deposited. When discovered, the mistake must be rectified, and an ordinary

<sup>1</sup> *Asher v. National Park Bank*, 7 Alb. L. J. 43.

<sup>2</sup> *Ladd v. Sears*, 9 Oregon, 244

<sup>3</sup> *Mechanics' Bank v. Earp*, 4 Raw. 384.

<sup>4</sup> *Schneider v. Irving Bank*, 1 Daly, 500.

<sup>5</sup> *Follansbee v. Parker*, 70 Ill. 11.

<sup>6</sup> 94 U. S. p. 346, citing *Buchlin v. Chaplin*, 1 Lans. 443; *Bruen v. Hone*, 2 Barb. 586; *Bullock v. Boyd*, 2 Edw. Ch. 293.

writing up of a bank-book with a return of vouchers or a statement of accounts, precludes no one from ascertaining the truth and claiming its benefit."

(b) *Oral evidence is admissible to explain technical terms.* Moreover, oral evidence is admissible to explain the meaning of terms, for example, a short entry, "seven per cent." "If a contract is in cipher, or a part of it, or if technical terms are used, or words of art, unintelligible to the court and jury, but which have a well-known meaning among mechanics and merchants, parol evidence is admissible to explain the meaning and give the words their known signification."<sup>1</sup>

(c) *Duty of bank to notify depositor on discovery of error.* A bank is under no legal duty to notify depositors of an error in entering a deposit in a pass-book; how its silence in the matter shall be regarded is a question of fact.<sup>2</sup>

§ 49. **How far a pass-book is conclusive evidence.** *Rule in England.* A bank book is *prima facie* evidence of the matters therein contained, but not conclusive.<sup>3</sup> Hence it may be shown by other evidence that a deposit was made for the use of a third person.<sup>4</sup> So, too, the bank-book of a deceased commissioner in equity, regular in form, credited with deposits more than sufficient to cover a balance against him in his office, was held to show a due discharge of official duty until the contrary appeared.<sup>5</sup> But, in England, if a depositor, supposing the entries on his pass-book to be correct, changes his position, by drawing on his deposit, for example, the bank is bound by its action. Nor can it set off money subsequently received against such erroneous entries.<sup>6</sup>

<sup>1</sup> Wingate v. Mechanics' Bank, 10 Pa. 104, p. 107; Daintree v. Hutchinson, 10 Mees. & Wels. 85; Goblet v. Beechey, 3 Sim. 24.

<sup>2</sup> Poor v. National Union Bank, 17 Week. Dig. 320.

<sup>3</sup> Union Bank v. Knapp, 3 Pick. 96. See Watson v. Phoenix Bank, 8 Met. 217; Commercial Bank v. Rhind, 3 Macq. H. L. Cas. 643.

<sup>4</sup> Stair v. York Nat. Bank, 55 Pa. 364.

<sup>5</sup> State ex rel. Van Wyck v. Norris, 15 S. Car. 241; Featherston v. Norris, 7 Id. 472; S. C., 14 Id. 624.

<sup>6</sup> Skyring v. Greenwood, 4 Barn. & Cr. 281; Shaw v. Picton, Id. 715; Shaw v. Dartnall, 6 Id. 56; Heane v. Rogers, 9 Id. 577; Hume v. Bolland, 1 C. & M. 130.

§ 50. **Bank is liable for receiving money without a pass-book and giving a wrong credit.** If a teller receive money without a deposit ticket, or pass-book, required by custom or rule of the bank, and, by mistake, credit the wrong person, the institution is liable. It cannot escape liability by violating its rules and customs.<sup>1</sup>

§ 51. **California usage in entering checks.** In San Francisco, California, the usage exists among the banks when a check is presented for deposit, to receive it whether drawn on the depository or another bank and enter a credit for the amount in the pass-book. When the check is paid the depositor is properly credited with it on the books of the bank; but if a check drawn on another bank is not paid on due presentation, or if it is ascertained within banking hours on the same day of depositing a check—which is drawn on the depository—that it is not good for want of funds to the drawer's credit, the check is returned to the depositor and the credit in his pass-book is cancelled. This usage has a legal sanction and determined the rights of a bank and depositor in that State.<sup>2</sup> It must be remembered that the usage does not prevail beyond the State however strongly intrenched it may be in reason and local practice.

§ 52. **A pass-book is not negotiable.** A pass-book is not negotiable nor can it be made so by a by-law with the depositor's assent. "The character of a security," said Chief Justice Wallace, of California, in the principal case on this subject, "as being negotiable or otherwise, must appear not by force of the mere stipulation of the parties that it shall be such, but must be implied by law as the result of the form and effect of the security itself. The pass-book of the bank here is an account kept between the bank and the depositor—an account acknowledged and certified from time to time showing the business transactions of the parties with each other at those periods and carrying upon its face a fluctu-

<sup>1</sup> Jackson Ins. Co. v. Cross, 9 Heisk. 283.

<sup>2</sup> National Gold Bank v McDonald, 51 Cal. 64.



ating balance. As being such an account it is not of itself a negotiable instrument, nor could any mere agreement of the parties to it have the effect to invest it with that character in a commercial sense. In this respect the account shown in the pass-book is not to be distinguished from the account of a merchant or tradesman kept with his customer in the same way, not would the agreement of the parties to such an account that the account itself might be transferred 'to order,' have any more effect upon the rights and remedies of any third party in the one case than in the other."<sup>1</sup> One application of this principle is that a savings bank cannot avoid or circumvent the legal requirement to pay over the money of a depositor on a garnishee process by his creditor.<sup>2</sup>

<sup>1</sup> *Witte v. Vincenot*, 43 Cal. 325 ; *Stewart v. State*, 42 Texas, 242.

<sup>2</sup> *Witte v. Vincenot*, 43 Cal. 325.



BOOK II.

THE

PAYING OF DEPOSITS.



## CHAPTER I.

### NATURE OF A CHECK.

HAVING stated the principles which relate to the depositing of money, those which relate to the paying of it naturally follow.

§ 53. **Is a check a bill of exchange?** (a) *Why question is important.* The usual mode of getting money is to present a written order or check and demand payment. The question has been much considered whether such an instrument is a bill of exchange or simply an order for money. The question is important, because if a check is a bill, days of grace should be added to the ordinary time for payment.

(b) *Opinion of Shaw, C. J.* "A check," says Chief Justice Shaw,<sup>1</sup> "is an order to pay the holder a sum of money at the bank on presentment of the check and demand of the money; no previous notice is necessary; no acceptance is required or expected; it has no days of grace. It is payable on presentment and not before. Mere notice to the bank that a party holds a check without presentment and demand will not bind the bank, and if there be funds, when notice is thus given, without presentment for payment by the holder, and in the mean time other checks of the same drawer are presented and the fund paid out upon them, the bank is not liable. Checks are not payable in the order of the priority in which they are given, but in that in which they are presented."

(c) *Opinion of United States Supreme Court.* No opinion is more worthy of consideration than the opinion of the Supreme

<sup>1</sup> Bullard v. Randall, 1 Gray, p. 606.

Court of the United States.<sup>1</sup> Speaking through Judge Swayne, "bank checks" are declared to be "not inland bills of exchange,"<sup>2</sup> but have many of the properties of such commercial paper; and many of the rules of the law merchant are alike applicable to both. Each is for a specific sum payable in money. In both cases there is drawer, a drawee, and a payee.<sup>3</sup> Without acceptance no action can be maintained by the holder upon either against the drawer. The chief points of difference are that a check is always drawn on a bank or banker.<sup>4</sup> No days

<sup>1</sup> Merchants' Bank v. State Bank, 10 Wall. 604, p. 647.

<sup>2</sup> A check is a bill of exchange payable on demand, *Harker v. Anderson*, 21 Wend. 372, and cases cited; *Franklin v. Vanderpool*, 1 Hall, 78; *Bill-gerry v. Branch*, 19 Gratt. 393. "Bank checks are in form and effect bills of exchange. They are not direct promises by the drawers to pay, but they are undertakings on their part that the drawees shall accept and pay, and the drawers are answerable only in the event of the failure of the drawees to pay," *C. J. Tenney, Foster v. Paulk*, 41 Me. p. 428.

<sup>3</sup> A writing like the following—

\$200. St. Paul, Minn., January 22, 1879.

D. & Co. Bankers, Pay to the order of  
on sight, Two hundred dollars in current funds.

E. L.

is not a check, because no payee is indicated therein, and consequently no action can be maintained against the drawer if it be not paid, *McIntosh v. Lytle*, 26 Minn. 336.

A check may be made in duplicate like a foreign bill of exchange. This will not render the payment conditional. *Merchants' Nat. Bank v. Ritzinger*, Ill. Sup. Ct., 6 Western Rep. 340.

The following written instrument was declared by the Supreme Court of Oregon, *Hawley v. Jette*, 10 Oregon, 31, to be a bill of exchange: "Portland, Or. December 10, 1879. \$300. On January 5, 1880, without grace, pay to the order of H. D. & Co. three hundred dollars, value received, and charge the same to the account of J. & C. To J. D. M., Oregon City."

<sup>4</sup> "The distinguishing characteristics of checks as contra-distinguished from bills of exchange are, that they are always drawn upon a bank or a banker; that they are payable immediately upon presentment without the allowance of any days of grace; and that they are never presentable for acceptance, but only for payment," Judge Shepley, *Morse v. Mass. Nat. Bank*, Holm. 209, p. 214; in the matter of Brown, 2 Story, 502; *Harris v. Clark*, 3 N. Y. 93, p. 114. In the case last cited the instrument read thus: Messrs. R. Clark & Co. Please pay to Nancy Harris or order \$30,000, and place the same to my account. New York, 9th July, 1844, Sidney Smith." This was

of grace are allowed. The drawer is not discharged by the laches of the holder in presentment for payment unless he can show that he has sustained some injury by the default. It is not due until payment is demanded, and the Statute of Limitations runs only from that time. It is by its face the appropriation of so much money of the drawer in the hands of the drawee to the payment of an admitted liability of the drawer. It is not necessary that the drawer of a bill should have funds in the hands of the drawee. A check in such case would be fraud.<sup>1</sup> All the authorities, both English and American, hold that a check may be accepted, though acceptance is not usual."

(d) *Opinion of Sharswood, J.* In Pennsylvania an instrument in the form of a bill of exchange drawn on a bank and payable at a future day is a check. "If," says Judge Sharswood, "such an order drawn upon a bank payable at a future day named in it must be considered as an inland bill of exchange, and not a check, then the payee or holder has the right to present it at once for acceptance, protest it at once for non-acceptance, and sue the drawer immediately. Should it be accepted, however, the funds of the drawer in the bank would necessarily be thereby tied up until the day of payment. All the objects of directing payment at a future day would thus be frustrated. What the drawer undertakes is

not a check but an inland bill of exchange. The following instrument was declared to be a banker's check: "Capt. Ring, Please to pay to Messrs. Elting and Shook one hundred dollars and oblige Stephen J. Brinkerhoff, June 3, 1822," *Elting v. Brinkerhoff*, 2 Hall, 459.

<sup>1</sup> A bank check is presumptively drawn on a previous deposit of funds, and is an absolute appropriation of so much in the hands of the bank to remain there till called for, *Stevens v. Park*, 73 Ill. 387. The presumption is, that a check is drawn against funds in a bank, *White v. Ambler*, 8 N. Y. 170.

In Kentucky the difference between a check and bill is declared to be that the former if drawn on a bank is payable on presentment without days of grace and no acceptance as distinct from payment is required. Furthermore, it is supposed to be drawn on a person's deposit of funds, and is an absolute appropriation of the amount mentioned in this check to the holder, *Smith v. Jones*, 2 Bush, 103; *Lester v. Given*, 8 Id. 357.

that on a day named he will have the amount of the check to his credit in the bank. In the mean time he wants the full and free use of his entire deposit. It is not denied that a post-dated check cannot be presented for acceptance. That is by implication payable on a future day. Why then is a check expressly so made payable to stand on different ground? In the case before us an ordinarily printed form of a bank check was evidently used, and the day of presentment written in one of the blanks. This is the most convenient form, for it calls the attention of the cashier or paying-teller to the fact which he would be likely to overlook if it were expressed only by the date. . . If we determine that an order like that before us is not presentable for acceptance before maturity we settle the question. It is a check and not a bill of exchange.”<sup>1</sup>

(e) *Rule in New York and other States.* On the other hand in New York<sup>2</sup> and other States,<sup>3</sup> the law as clearly calls such an instrument a bill; nor can evidence of local usage be received to change its legal character in this regard. In these States, therefore, a check drawn by a person on a bank and payable to another after date is entitled to days of grace. The court in Illinois has said that this would be so independently of the statute of 1861, providing for uniformity in calculating them.<sup>4</sup>

(f) *Rhode Island case.* In a Rhode Island case the check read: “Providence, Oct. 6, 1854. Westminster Bank. Ninety days after date, pay to the order of James Wheaton four hundred and fifty dollars ——— cents. \$450. Sinope

<sup>1</sup> *Champion v. Gordon*, 70 Pa. 474; *Lawson v. Richards*, 6 Phila. 179.

<sup>2</sup> *Bowen v. Newell*, 13 N. Y. 290. This case was tried three times beside that just mentioned, 5 Sand. 326; 8 N. Y. 190; 2 Duer, 584; *Merchants' Bank v. Woodruff*, 6 Hill, 174; Rev. 25 Wend. 673.

<sup>3</sup> In California, *Minturn v. Fisher*, 4 Cal. 35. In Ohio, *Morrisons v. Bailey*, 5 Ohio St. 13. In a subsequent case the nature of the instrument was determined by the intention of the parties, *Andrew v. Blachly*, 11 Ohio St. 89; Aff. 1 Disney, 78. In Indiana, *Glenn v. Noble*, 1 Blackf. 104.

<sup>4</sup> *Culter v. Reynolds*, 64 Ill. 321.



Mills. Indorsed in blank, James Wheaton, per B. Cozzens, agent."

"Was this a check?" asked Judge Brayton. "We are of the opinion that it was. A check is an order drawn upon a banker, or a person acting as a banker in England, or in this country upon such a person or upon a bank. It was originally part of the definition of a check that it was payable on demand. It was afterwards held that it might be post-dated and still be a check. In such case it was payable immediately after date, though days had elapsed since it came to the payee's hands. Still later, it was held to be a check though payable on a day certain after date, if drawn upon a bank or banker. The instrument in suit differs from the last in this only, that the day when it is payable is not named, but it is payable a certain number of days after date, and that the precise day of payment is to be ascertained by calculation; all the elements of such calculation being contained in the paper itself. Substantially and for all practical purposes it is the same, since the day may be made certain from the paper itself. At this day the only distinguishing difference between a general bill of exchange and a check is that a check must be drawn upon a bank or upon a banker or one acting as a banker."<sup>1</sup>

§ 54. **Question should be settled.** Whether the instrument be a check or bill of exchange is not so important as to remove the doubt. The several States which have made decisions on the subject will doubtless adhere to them, and in the others the doubt should be removed. So long as no rule exists the holders of these ambiguous instruments may suffer from having none, just as the holder did in the Rhode Island case. Regarding the instrument as a bill of exchange, he gave notice to the indorser of its non-payment by the drawer three days after the time mentioned; but as it was declared to be a check the notice was too late and the indorser was released.

<sup>1</sup> *Westminster Bank v. Wheaton*, 4 R. I. 30.

§ 55. **When a check is a bill by particular statute.** A check is a bill of exchange within the meaning of the statute in New York which authorizes a recovery on a negotiable bill of exchange which has been lost, on giving parol evidence of its contents and tendering to the drawer at the time a bond of indemnity.<sup>1</sup>

§ 56. **Is not a check if drawn on a closed bank.** An instrument, though in the form of a check, cannot be thus considered unless drawn on a bank engaged in business. If it has been closed several years, and is in liquidation, and its indebtedness to depositors is bought and sold like a stock, a check drawn thereon would be mere evidence of an assignment of a deposit.<sup>2</sup>

§ 57. **Must be payable in money.** A check must be payable in money. A check, therefore, drawn by a bank in Mobile on a bank in New Orleans in April, 1862 (during the civil war), payable in currency, was not an instrument payable in money, and therefore was not negotiable.<sup>3</sup>

§ 58. **Consideration of a check to bearer need not be proved.** (a) *Remarks of Thompson, J.* The holder of a check payable to bearer need not prove a consideration unless there is reason for supposing that he has obtained possession of it by fraud. "This principle," said Judge Thompson more than eighty years ago, "seems necessary for the purpose of strengthening and facilitating that commercial intercourse which is carried on through [bills of exchange and promissory notes]. The reason of the rule is equally applicable whether the bill or

<sup>1</sup> *Jacks v. Darrin*, 3 E. D. Smith, 548, the court citing *Boehem v. Sterling*, 7 Term R. 419, p. 426; *Cruger v. Armstrong*, 3 Johns. Cas. 5; *Merchants' Bank v. Spicer*, 6 Wend. 443; *Murray v. Judah*, 6 Cow. 484.

<sup>2</sup> *Harmanson v. Bain*, 1 Hughes, 188.

<sup>3</sup> *Bank of Mobile*, 42 Ala. 108; see *Little v. Phenix Bank*, 2 Hill, 425; *Lieber v. Goodrich*, 5 Cow. 186; *Thompson v. Sloan*, 22 Wend. 73, and cases cited in *Young v. Scott*, 5 Ala. 475; *Carlisle v. Davis*, 7 Id. 42. Protest in the above case of the *Bank v. Brown* was not necessary to fix the liability of the drawer, but the check should have been presented for payment within a reasonable time after it was drawn and delivered, and prompt notice of its non-payment should have been given to the drawer.

note be made payable to bearer or order; and I can see no good reason why it should not apply to bank checks. Where, however, the instrument is made payable to bearer, so that no indorsement is necessary in making a transfer, and there are any circumstances of suspicion attending the manner in which the holder became possessed of it, it is necessary he should show that he paid a valuable consideration, or that he came fairly by it. As, if it had appeared that the check had been lost, it would have been such a circumstance of suspicion as to impose on the holder the necessity of proving that he came to the possession, *bona fide*.”<sup>1</sup>

(b) *When want of consideration may be shown.* As want of consideration for negotiable paper may be shown in a suit between the original parties, and also in a suit by a third party who has taken it knowing the fact, so may the refusal to pay a check be defended on the same ground. The following illustration of this principle may be given: A., for the accommodation of B., and without consideration, executed and delivered to him checks drawn on a bank and payable to bearer, B. agreeing to take care of them. The checks were afterward delivered for a valuable consideration by B. to C., who at the time of receiving them had full knowledge of the circumstances under which they were given. Furthermore, C. agreed not to present the checks at the bank, but to look to B. only for payment. C. having died, his administrator brought a suit against A. to recover the amount of the checks. The court held that parol testimony was admissible to prove

<sup>1</sup> Conroy v. Warren, 3 Johns. Cas. 259; Grant v. Vaughn, 3 Burr. 1516. One possessed of an order for the payment of money to bearer, addressed to no particular person as drawee can maintain no action thereon against the person subscribing it, without showing that he came fairly by it for a valuable consideration, Ball v. Allen, 15 Mass. 433.

“The law is now understood to be that the bearer of a bill of exchange, or a promissory note, payable to bearer, need not prove a consideration, unless he possesses it under suspicious circumstances, and that such paper stands on the same footing with specialties, and *prima facie* imports a consideration; and the rule is equally applicable to checks,” Foster v. Paulk, 41 Me. p. 428. An exchange of checks constitutes a good consideration, *Id.* 425.

the agreement between B. and C., and also that the administrator could not recover.<sup>1</sup>

(c) *Judge Duer's opinion.* Nevertheless, said Judge Duer,<sup>2</sup> "we cannot think that a defence which is rested upon the single ground of the absence of a valuable consideration, deserves much favor in a court of justice. Where the promise is deliberate and is reduced to writing, the rule of law which permits the defence is almost peculiar to our own jurisprudence, and is condemned by the general sense of legislators and jurists as well of merchants. Still, as the rule undoubtedly exists it must be obeyed, and the defence, when clearly established, be admitted to prevail; but it is not inconsistent to say that, considering the nature of the defence, the party who relies upon it should be held to the strictest proof and every doubt that he suffers to remain be decided against him."

§ 59. **Must be properly signed.** (a) *Different modes of signing.* The check must be properly signed. Most questions which relate to signing are whether the signature is personal or representative. A check having the words "Ætna Mills" printed in the margin, and signed "J. D. Farnsworth, Treasurer," was declared to be not the individual check of Farnsworth, but the company's. "The case," said Judge Gray, in giving the opinion of the court, "is not distinguishable from those in which similar instruments have been held . . . to be the contracts of the principal only. The court has always laid hold of any indication on the face of the paper,

<sup>1</sup> Dagget v. Whitney, 35 Conn. 366. H. and K. were in the habit of accommodating each other by exchanging checks. H. transferred K.'s check to a creditor as collateral to a debt, who afterward sued the maker and recovered. Although K. had not transferred H.'s check or collected the money thereon, the creditor could recover the amount, Rankin v. Knight, 1 Cin. S. C. Rep. 515. It contains a notice or review of several cases relating to the consideration for exchanged checks, Cowley v. Dunlop, 7 Term, 565; Cardwell v. Martin, 9 East, 190; Buckler v. Buttivant, 3 East, 72; Eaton v. Carey, 10 Pick. 211; Dowe v. Schutt, 2 Denio, 621; Whittier v. Eager, 1 Allen, 499; Higginson v. Gray, 6 Met. 212; Fields v. Stunston, 1 Cold. 40; Burdon v. Benton, 9 Q. B. 843.

<sup>2</sup> Fitch v. Redding, 4 Sand. 130, p. 136.

however informally expressed, to enable it to carry out the intention of the parties.”<sup>1</sup> The illustrations given by the court are worth adding. “In *Tripp v. Swanze Paper Co.*,<sup>2</sup> a draft not naming the principal otherwise than by concluding ‘and charge the same to the Swanze Paper Company, yours respectfully, Joseph Hooper, Agent,’ was held to be the draft of the company. In *Fuller v. Hooper*,<sup>3</sup> a draft with the words ‘Pompton Iron Works’ printed in the margin, and concluding ‘which place to account of Pompton Iron Works, W. Burt, Agent,’ was held to bind the proprietor of the Pompton Iron Works; and in *Bank of British North America v. Hooper*,<sup>4</sup> in which a draft concluding ‘and charge the same to account of proprietors Pembroke Iron Works, your humble servant, Joseph Barrell,’ without otherwise naming a principal or disclosing the signer’s agency, was held to bind him only, it was said by the court that in *Fuller v. Hooper*, the words ‘Pompton Iron Works’ in the margin of the draft fully disclosed the principal, and that the draft was drawn on his behalf. So in *Slawson v. Loring*,<sup>5</sup> in which a draft, having the words ‘Office of Portage Lake Manufacturing Company, Hancock, Michigan,’ printed at the top, was signed ‘I. R. Jackson, Agent,’ Chief Justice Bigelow said, ‘No one can doubt that on bills thus drawn the agent fully discloses his principal, and that the drawer could not be personally chargeable thereon.’”

(b) *Remarks of Bradley, J.* “The ordinary rule is,” said Judge Bradley, speaking for the Supreme Court of the United States, “that if a person merely adds to the signature of his name the word ‘Agent,’ ‘Trustee,’ ‘Treasurer,’ etc., without disclosing his principal, he is personally bound. The appendix is regarded as a mere *descriptio personæ*. It does not of itself make third persons chargeable with notice of any representative relation of the signer. But if he be in fact a mere

<sup>1</sup> *Carpenter v. Farnsworth*, 106 Mass. 561.

<sup>2</sup> 13 Pick. 291.

<sup>3</sup> 3 Gray, 334.

<sup>4</sup> 5 Id. 567.

<sup>5</sup> 5 Allen, 343.

agent, trustee, or officer of some principal and is in the habit of expressing in that way, his representative character in his dealings with a particular party who recognizes him in that character, it would be contrary to justice and truth to construe the document thus made and used as his personal obligations, contrary to the intent of the parties."<sup>1</sup> The check on which a personal recovery was sought was signed by "E. P. Aistrop, Sec'ty," and "W. S. Williams, Vice-Prest.," but did not disclose either's official relation. Judge Bradley said that it was unnecessary to determine whether the form of the document was sufficient to charge innocent holders of the check with notice of its character. The fact that it bore two official signatures, that of the complainant as vice-president, and of Aistrop, as secretary, was so unusual on the hypothesis of its being an individual transaction, and pointed so distinctly to an official origin that it might very well be doubted whether any holder could claim to be ignorant of its true character. "But in the present case the party claiming to have the beneficial interest in the check was a fellow agent of the company on whose account it was drawn, actually knew its origin, and cannot pretend that he took it for anything else than a check of the corporation. The plea that the name of the principal was not disclosed on the face of the paper cannot be made by him, for he knew all about it."

(c) *Rule in Alabama and New Jersey.* A bill of exchange, for example, signed "John Kean, President Elizabethtown & Somerville R. R. Co.," is ambiguous on the face of it, whether he or the company is the drawer. Without explanation he would be considered the drawer of the bill. In such a case parol proof is admissible to show who was to be bound by the instrument.<sup>2</sup> In *Lazarus v. Shearer*,<sup>3</sup> the Chief Justice, Collier, says: "Where it is doubtful from the face of the contract whether it is intended to operate as the personal engagement of the party signing it, or to impose an obligation

<sup>1</sup> *Metcalf v. Williams*, 104 U. S. 93, p. 98.

<sup>2</sup> *Keen v. Davis*, 21 N. J. Law, 683.

<sup>3</sup> 2 Ala. 718.

upon some third person as his principal, parol evidence is admissible to show the true character of the transaction." This was declared to be sound rule by C. J. Green in the above case.

(d) *English case.* Three directors of a railway company signed a document which was intended as an order on the company's bankers to pay company money to a third party. The document was signed by them individually and countersigned by the secretary of the company with the word "Secretary" added to his signature. Nor was the official character of the directors disclosed in any part of the document. It did contain a stamp on which was impressed the name of the company, but a similar stamp was used on all its documents. It was held that this document was not the company's check, and, consequently, that it was not bound therefor.<sup>1</sup>

§ 60. **Check must be delivered.** A check has no validity until actually delivered to the payee.<sup>2</sup> But a bill or check payable to a person or bearer is transferable by mere delivery; and a check payable to "bills payable or order" is negotiable like a check payable to bearer.<sup>3</sup>

§ 61. **Rights of a bona fide holder.** The holder of a check is regarded as the rightful holder.<sup>4</sup> And if a check is in the possession of a *bona fide* holder, the law presumes that the drawer put it into circulation, unless he can show otherwise.<sup>5</sup> Nor is a *bona fide* holder affected by secret equities existing between antecedent parties.<sup>6</sup> And if a check be given by an agreement which is not sanctioned by the Bankrupt Law of New York, it is nevertheless valid if owned by a *bona fide* holder for value.<sup>7</sup> But in New York a bank that receives a check for a consideration which is more than a year old is

<sup>1</sup> Serrell v. Derbyshire Railway Co., 19 L. J., C. P. 371.

<sup>2</sup> Cowing v. Altman, 71 N. Y. 435; Rev. 5 Hun, 556.

<sup>3</sup> Mechanics' Bank v. Straiton, 3 Keyes, 365.

<sup>4</sup> Foster v. Paulk, 41 Me., p. 428; Cruger v. Armstrong, 3 Johns. Cas. 5; Conroy v. Warren, 3 Id. 259.

<sup>5</sup> Hoyt v. Seeley, 18 Conn. 353.

<sup>6</sup> Stewart v. Smith, 17 Ohio St. 82.

<sup>7</sup> Cowing v. Altman, 71 N. Y. 435; second trial, 79 Id. 167.

not regarded a *bona fide* holder without notice of imperfection.<sup>1</sup> In Kentucky, on the other hand, a check taken some days after date is free from all equities. There, a check is never over-due because it is payable on presentation or demand.<sup>2</sup>

§ 62. **Memorandum check.** (a) *Described by Judge Putnam.* Before presenting the principles that are applied to determine the meaning of checks, a memorandum check may be defined. This, in the words of Judge Putnam,<sup>3</sup> is a contract by which the maker engages to pay the *bona fide* holder absolutely, and not upon a condition to pay if the bank upon which it be drawn should not pay upon presentation at maturity, and if due notice of the presentation and non-payment should be given. "The word 'memorandum' written or printed upon the check describes the nature of the contract with precision. It is an express waiver on the part of the maker of the check of any objection against the claim of a *bona fide* holder that it had not been presented for payment, or if it were presented and not paid, and that he had had no notice of the non-payment by the bank therein named."

(b) *Franklin Bank v. Freeman.*<sup>4</sup> A printed blank check, therefore, on the North Bank, for example, altered by substituting "Market" for "North" and by inserting the word "Memo.," and filled up in the usual way is a memorandum check, and it has been held that there is no necessity for presenting such a check to the Market Bank for payment, even though the drawer did business there, and even though a common check drawn by him for the same amount would have been paid if presented.

(c) *New York view on the subject.* The New York legal tribunals maintain a somewhat different view of the function of a memorandum check. Said Chancellor Walworth in the leading case on the subject:<sup>5</sup> "The alleged custom of Wall

<sup>1</sup> *Cowing v. Altman*, 1 Th. & C. 494.

<sup>2</sup> *Smith v. Jones*, 2 Bush, 103; *Lester v. Given*, 8 Id. 357. See § 297.

<sup>3</sup> *Franklin Bank v. Freeman*, 16 Pick., p. 539.

<sup>4</sup> 16 Pick. 535.

<sup>5</sup> *Dykers v. Leather Manufacturers' Bank*, 11 Paige, 612.



Street that an ordinary check upon a bank is to be converted into something contrary to its legal effect by writing *mem.* in one corner thereof, certainly amounts to nothing. Indeed the weight of the testimony is that this memorandum amounts to nothing more than an indication of an understanding that the check is not to be presented immediately for payment, so as to destroy the drawer's credit with the bank when he has not provided funds to meet the draft."

(d) *Exchange of memorandum checks.* Whenever persons exchange their memorandum checks for mutual accommodation, no right of action accrues in behalf of one against the other until the plaintiff has paid the check given by him; while it is outstanding and unpaid the relation between them is merely that of principal and surety.<sup>1</sup>

§ 63. **Construction of foreign check.** (a) *Law of place of payment applies.* Returning to the general topic, the principles which relate to the construing of checks may be prefaced with the inquiry: By what law shall a check be construed which is made in one State and payable in another? This question has been answered in Illinois. A check drawn by a depositor in Indiana on his bank in Illinois is construed by the law of the latter State. Hence a drawer in Indiana transferred by operation of law his deposit to the holder of his check as soon as he gave it to him; but if he had drawn his check on a bank in Indiana, where a different rule prevails, the deposit would not have been transferred till the check was accepted by the drawee bank.<sup>2</sup> In briefer language the law of the place of performance is applied.<sup>3</sup>

(b) *Limitation of principle.* In those States in which the effect of a check is to assign the drawer's deposit, or whenever the check operates as an equitable assignment of the drawer's "claim against the bank," the transaction is regarded

<sup>1</sup> Burdsall & Co. v. Chrisfield, 1 Disney, 51.

<sup>2</sup> Bank of America v. Indiana Banking Company, 114 Ill. 483; Union Nat. Bank v. Oceana County Bank, 80 Id. 212; Dreyfuss v. Adae, Hamilton Co. Dis. Ct., Ohio, 4 Bull. 671.

<sup>3</sup> Andrews v. Pond, 13 Peters, 65.

as local and fully executed; no application, therefore, of the law of the place where the check is payable is required, for the transaction is considered as completed where the drawer and check holder reside. Thus, an Ohio banker drew his check, the day before assigning for the benefit of his creditors; on his funds in a foreign bank. It was not paid though in consequence of his insolvency. The funds were afterward paid by the bank to the assignee. In a suit against him by the holder of the check it was held that the law applicable to the instrument was the law of Ohio and not that of the foreign State where the drawee bank existed.<sup>1</sup>

§ 64. **Cannot be contradicted by oral evidence.** (a) *May be used to show non-delivery.* As a check is a written contract oral declarations or agreements cannot be admitted to contradict or vary it. Moreover, the law presumes, nothing appearing to the contrary, that the check is to operate from delivery. "But," says Judge Bullock,<sup>2</sup> "this presumption may be rebutted by testimony, oral or written, which goes to show that the contract was yet in embryo, or that no complete delivery was intended, and that no interest passed.<sup>3</sup> The true distinction seems to be that while you cannot, by parol, show that a note, check, or bill, absolute upon its face and once fully executed and delivered is, in a certain event, to become void, or is not to be paid or performed in the mode its terms import, you may, as between the original parties, show that such note, bill, or check was not to operate as such but in a certain event thereafter to happen—the obligatory nature of the instrument being made to depend upon the happening of this event, the obligation itself meanwhile remaining suspended. In such a case the delivery of the written instrument is in the nature of a delivery in escrow."<sup>4</sup>

<sup>1</sup> Davis v. Aday, Sup. Ct. of Cinc., Special T., 4 Bull. 295.

<sup>2</sup> Sweet v. Stevens, 7 R. I. 375, p. 382.

<sup>3</sup> Murray v. Earl of Stair, 2 Barn. & Cr. 82; S. C., 9 Eng. C. L. 33; Marston v. Allen, 8 Mees & Wels. 494; Bell v. Viscount Ingestre, 12 Ad. & E. 317; S. C., 64 Eng. C. L. 317.

<sup>4</sup> Wallis v. Littell, 5 Law T. Rep., N. S. 489; Pym v. Campbell, 25 L. J., N. S. 277.

(b) *Also who were the intended parties.* Parol evidence can also be admitted to show who were the intended parties to a check. Thus a check was dated at Milwaukee and drawn on "A. B., Bank of Milwaukee," payable to bearer, but was drawn and delivered at Waukesha. A. B. was a banker at Waukesha and there was no such bank or person as A. B., Bank of Milwaukee. Both the maker and the payer of the check lived at Waukesha, and also the plaintiff who purchased the check from the payee. The check was never presented to A. B. for payment and soon afterward he failed. It was held that the check showed on its face that it was drawn on A. B. personally, that the words "Bank of Milwaukee" should be rejected, and that if any doubt existed concerning the true construction of the check, parol evidence could be admitted to show who the parties intended were.<sup>1</sup>

(c) *Written sum controls figures.* If the written sum in a check which the depositor has ordered the bank to pay does not correspond with the sum expressed in the marginal figures, the former will be regarded as correct.<sup>2</sup>

(d) *Explanation of deposit ticket.* A deposit ticket is not a contract and may be explained by parol evidence. In *Weisinger v. Bank*<sup>3</sup> this question was decided, the court saying that the ticket "is not an engagement in writing nor on its face does it contain a contract of the parties deliberately agreed to. It is not a contract in terms, nor was it intended to be. It more nearly corresponds to the meaning of the word memorandum, 'a record of something which it is desired to remember; a note to help the memory.'"

§ 65. **Construction of corporation checks.** Courts have interpreted pretty liberally the charters or other instruments prescribing modes for making checks and getting money on them. Thus, in the deed regulating the affairs of the Norwich Yarn Co.,<sup>4</sup> which prescribed that all the checks beyond a fixed amount should be signed by three directors, the

<sup>1</sup> *Cork v. Bacon*, 45 Wis. 192.

<sup>2</sup> *Smith v. Smith*, 1 R. I. 398.

<sup>3</sup> 10 Lea, 330.

<sup>4</sup> 22 Beav. 143.

language was declared to be directory and not imperative, and, therefore, that they should be allowed any sums drawn from the bankers by checks which were not properly signed, if *bona fide* applied for the benefit of the company.

§ 66. **Check is not payment until paid.** (a) *Rights of holder.* A check given in the ordinary course of business for a debt is not payment, even if the drawer has money on deposit,<sup>1</sup> until paid.<sup>2</sup> If payment be refused without fault or negligence of the holder, he may resort to the original indebtedness.<sup>3</sup> He is, therefore, merely the agent of the drawer in getting money from the bank for the purpose of applying it to satisfy his debt.<sup>4</sup> Hence, a person who received a check for timber at five o'clock in the afternoon, and before eleven o'clock the next day the bank had been prohibited by the court from making more payments, and before presentation of the check in question, had the right to waive the check and recover in an action for the value of the timber.<sup>5</sup>

(b) *Agent's payment by his check instead of money.* The agents of a savings institution were directed to sell coin belonging to it, and to deposit the proceeds in B. bank to the credit of A. bank. Instead of depositing the proceeds, they deposited their own check and gave notice to A. bank of the deposit in money in B. bank from the sale of the coin. The check was not good. It was held that neither A. nor B. bank was bound by the credit. The check was not money, and the agents had no right to substitute it therefor. Nothing but an actual and *bona fide* deposit of money to the credit of the B. bank could render it responsible. The savings institution therefore was as clearly liable for the misconduct of its agents as though it had deposited the worthless check.<sup>6</sup>

<sup>1</sup> Porter v. Talcott, 1 Cow. 359; Everett v. Collins, 2 Camp. 515.

<sup>2</sup> Burkhalter v. Second Nat. Bank, 42 N. Y. 538. The receipt of a bank check is not payment of an antecedent debt until the check itself is paid, Phillips v. Bullard, 58 Ga. 256.

<sup>3</sup> Cromwell v. Lovett, 1 Hall, 56; People v. Howell, 4 Johns. 296.

<sup>4</sup> Kobbi v. Underhill, 3 Sand. Ch. 277.

<sup>5</sup> Cromwell v. Lovett, *supra*.

<sup>6</sup> Dimes Sav. Institution v. Allentown Bank, 65 Pa. 116.

(c) *Summary of the law.* "It is well settled," says Judge Dickerson,<sup>1</sup> "that taking a check for an existing debt is not *ipso facto* payment of the debt;<sup>2</sup> not even if it be given for a note which is surrendered;<sup>3</sup> nor where a receipt is given for the old debt upon delivery of the check;<sup>4</sup> nor if on presentment of one check the holder receives from the drawer a check for the amount of his check."<sup>5</sup>

§ 67. **Acceptor must be diligent in collecting.** But the acceptance of a check implies an undertaking on the part of the holder to use due diligence in presenting it for payment, and if he does not, and the drawer sustains a loss in consequence, the debt will be regarded as paid. Thus the payee of a draft—which was given for a bill of goods—on the day of receiving it presented the same to the drawee and was given his check in return. Had this been presented to the bank on that day, it would have been paid. On the next day it was presented, but payment was refused, and the drawers of the draft were at once informed by letter of the fact. Though the check could be received as payment only by express agreement; and though the payee was not bound as between himself and the drawee to present the check until the day after its receipt, yet as between himself and the drawers of the draft it was his duty to present the check at once; he was, therefore, negligent in not doing so, and consequently chargeable with the loss. In other words, the

<sup>1</sup> Marrett v. Brackett, 60 Me. p. 527.

<sup>2</sup> Taylor v. Wilson, 11 Met. 44.

<sup>3</sup> Olcott v. Rathbone, 5 Wend. 490.

<sup>4</sup> Bradford v. Fox, 38 N. Y. 289.

<sup>5</sup> Kelty v. Second Nat. Bank, 52 Barb. 328. "The giving of a check for an antecedent debt is not an absolute payment and extinguishment of the debt in the absence of an agreement giving it that effect. Ordinarily, it is only a means of payment, and the debt will not be extinguished unless and until the check be paid, or unless loss be sustained by the drawer in consequence of the laches of the holder, in which case the debt will be discharged in proportion to the loss sustained," Burks, J., Blair v. Wilson, 28 Gratt. p. 171. A clearing-house manager's warrant, which is taken for the surrender of a check, is not payment if the check be afterwards dishonored, unless it was thus taken by special agreement or the holder is negligent, Merchants' Nat. Bank v. Procter, 1 Cin. S. C. Rep. 1.

seller was precluded from recovering the price of his goods of the buyer, on the ground of negligence in presenting the check.<sup>1</sup>

§ 68. **Check as evidence of debt and payment.** A check is *prima facie* evidence of a debt,<sup>2</sup> but this may be disproved.<sup>3</sup> Nor is a check payable to A. or bearer evidence of payment to A.,<sup>4</sup> unless credited by the bank to him.<sup>5</sup> And surely a check is not payment which is drawn in favor of a debtor's agent, though intended for the creditor and drawn so with his assent.

§ 69. **When check is payment.** (a) *By agreement.* To be payment of his original debt, it must be agreed that the check shall be taken by the creditor as payment.<sup>6</sup> But if such an agreement be made, the debtor is discharged as soon as his check is accepted.<sup>7</sup>

<sup>1</sup> *Smith v. Miller*, 43 N. Y. 171, 52 N. Y. 545. See Chapter X.

<sup>2</sup> *Terry v. Ragsdale*, 33 Gratt. 342; *Headley v. Reed*, 2 Cal. 322; *Chesnut v. Chesnut*, 15 Brad. 390.

<sup>3</sup> *Huntzinger v. Jones*, 60 Pa. 170; S. C., 6 Phila. 576; *Phillips v. Monges*, 4 Wharton, Pa. 226.

<sup>4</sup> *Patton v. Ash*, 7 Serg. & Raw. 116.

<sup>5</sup> *Henry v. Oves*, 4 Watts, 46. The possession of a concealed check by the drawer who testified that on the day of its date he made and delivered it to the drawee in payment of a debt is sufficient *prima facie* proof of the payment of the amount named therein, *Peavy v. Hovey*, 16 Neb. 416.

<sup>6</sup> *Mullins v. Brown*, 32 Kansas, 312. "A check or promissory note either of the debtor or third person, received for a debt, is not payment if not itself paid, except in cases where it is positively agreed to be received in payment," Chancellor Zabriskie in *Freeholders of Middlesex v. Thomas*, 20 N. J. Eq. p. 41.

"While, however, the giving of a check by a debtor to his creditor is generally presumed to be only a provisional or conditional payment of the debt for which it is given, yet such check, by agreement between the parties, may be given and received in full payment and absolute discharge in satisfaction of the debt," *Burks, J., Blair v. Wilson*, 28 Gratt. 165, p. 172.

When a debtor gives his creditor a check, though having no funds at the bank, under an agreement that it is not to be paid, and gives a new note for the sum due at a less rate of interest, no money passing between them, the check is not payment of the original debt, *Woodburn v. Woodburn*, 115 Ill. 427.

<sup>7</sup> *Turner v. Bank*, 3 Keyes, 425; S. C., 4 Abb. App. Dec 434; *Aff.* 23 How. Pr. 399.

(b) *Presumptively check is not payment.* The presumption is, when taking the check of a debtor, that it is not an absolute payment.<sup>1</sup> Whether it is thus accepted or not is a question of fact to be determined whenever it shall arise.<sup>2</sup>

§ 70. **Acceptance an appropriation of deposit.** If a creditor accept a check for the amount due, it is an appropriation by the debtor of his deposit to that amount to his creditor. Yet, before the latter can hold the debtor responsible as drawer he must show that payment of the check was demanded in a reasonable time and refused; or, he must show a valid excuse for not thus presenting it. For, if the creditor should not present the check within a reasonable time, and the bank within that time should become insolvent, the drawer would be relieved of liability, and the loss would fall on the creditor or holder of the check.<sup>3</sup>

§ 71. **Acceptance of third party's check is not payment.** (a) *Illustrations.* When the check of a third party is given in good faith in payment, the receiver can look to the person who gave it to him if it be not paid. Thus, a buyer of goods sent to the seller a check drawn by one bank on another, which was indorsed by the buyer to whose order the check was payable. The seller on receiving the check sent a receipt to the buyer acknowledging payment of the bill. At the time of sending the check it was supposed by both parties that it was good, but in truth there were no funds to pay it. The buyer was obliged to lose it and pay the seller in a different manner.<sup>4</sup> Likewise a debtor who had a bank as his agent transmit its

<sup>1</sup> The acceptance of a bank check by a creditor is not an absolute payment of the drawer's debt, but is a conditional payment. *Stevens v. Park*, 73 Ill. 387; *Peoria & Pekin Union R. Co. v. Buckley*, 114 Ill. 337.

<sup>2</sup> *Springfield v. Green*, 7 Baxter, 301; *Blair v. Wilson*, 28 Gratt. 165.

<sup>3</sup> *Springfield v. Green*, *supra*.

<sup>4</sup> *Fleig v. Sleet*, 43 Ohio St. 53. "When goods are purchased upon credit, or money borrowed, and the security agreed upon by the parties turns out to be of no value and different from what it was represented by the debtor, it may be treated as a nullity, and an action will lie immediately for the sum it was intended to secure," *Parker, C. J., Manufacturers and Mechanics' Bank v. Gore*, 15 Mass. 75, p. 79.

draft on a New York bank to his creditor, but which was protested in consequence of the failure of the drawing bank, did not extinguish the original debt, although the creditors when receiving the draft forwarded to the debtor the account marked paid and signed by them.<sup>1</sup>

(b) *A Kansas case.* The check of a third person, H., was taken in payment for merchandise. He retained it more than three weeks, though living within fifteen miles of the bank on which it was drawn. When going to present it he learned that the bank had suspended payment the day before. At the time the check was drawn H. had no funds in the bank, and his account was overdrawn at the time of its suspension. "Still, according to the testimony of the president of the bank, this check would have been paid if presented. The check was not received as payment, and there was no settlement of the matter after the return of the check." The court decided that the debt had not been paid, and that an action could be maintained thereon.<sup>2</sup>

(c) *A Massachusetts case.* To pay an assessment, the payee of two checks drawn on banks by third persons payable to his order, indorsed the same to the treasurer of the corporation to which the assessment was to be paid, saying they were "all right" and receiving the treasurer's receipt and the balance in money. One of the checks was good when the payee took it, ten days before, but on the day of indorsing it

<sup>1</sup> *Weaver v. Nixon*, 69 Ga. 699.

<sup>2</sup> *Mordis v. Kennedy*, 23 Kansas, 408. "It is settled," said Judge Brewer, "that the mere taking of a bank check is not a payment of the debt (*Kermeyer v. Newby*, 14 Kansas, 164), and if the check be not paid the party may return it and sue on the original debt. It is also clear that the same strict rule of presentment and notice does not obtain as between the drawer and drawee. The former is not discharged unless he suffers some loss through the delay of the holder in presenting the check (*Gregg v. George*, 16 Kansas, 546). Therefore, H., the drawer, was clearly not discharged from his obligation to the party to whom he gave his check, for he has lost nothing. If the check had been presented and paid, he would simply have owed the bank so much more—the only difference would have been in the person of the creditor."



the maker failed. The payee, though, did not know this till two days afterward. The treasurer deposited the checks in a bank for collection, and the unpaid one was returned in usual time in consequence of non-payment. It was not protested, nor was any formal notice given to charge the payee as indorser. The treasurer four days after its return sent it to the payee with the request to make the amount good. This he was compelled to do.<sup>1</sup>

**§ 72. Payment of draft by check.** When a draft on a bank has been presented and paid by transferring the same to the general credit of the payee, and the bank pays the amount on his check, the draft is regarded as paid.<sup>2</sup> Notice from the drawer to the bank not to pay the same served after the draft has been presented and paid, will not charge the institution, though it has in its possession at the time a sufficient deposit of the payee to pay the draft.<sup>3</sup>

**§ 73. Check is not payment if deposit be withdrawn.** If a person should pay a creditor with his check, and soon afterward, before the presenting of the same for payment, should withdraw his deposit, he would be liable, although the bank should fail. While the drawer would not be liable if he should keep his funds there in consequence of the failure of the bank, yet he would be liable by withdrawing them

<sup>1</sup> *Small v. Franklin Mining Co.*, 99 Mass. 277. Chapman, C. J., said: "The plaintiff [who was the payee and stockholder assessed] was not entitled to such notice as must be given upon the dishonor of a bill of exchange. He was at most entitled to such reasonable notice as would save him from loss. It does not appear that the delay to give him notice, which was of a few days only, occasioned any damage to him, or that the value of the check was lessened."

<sup>2</sup> *S.*, the indorser on a protested bill of exchange held by a bank, procured a discount of his note for the purpose of paying the bill with the proceeds, but giving no directions to do this. Accordingly, they were placed to his credit, and afterward were applied by the cashier to the payment of the note which was cancelled and delivered to *S.* It was held that in the absence of other proof the note must be considered as extinguished, and no action could be maintained thereon by the bank, *Shaw v. Branch Bank*, 16 Ala. 708.

<sup>3</sup> *Weedspott Bank v. Park Bank*, 2 Keyes, 561.

before its failure.<sup>1</sup> Nor is his liability changed by the assignee's recovery of the deposits thus withdrawn by him before the failure of the bank.

§ 74. **Acceptance discharges drawer from garnishment.** A bank-check given and accepted as payment of the balance of an account is a sufficient payment to discharge the drawer if summoned as trustee of the payee in an action begun against the latter the day of giving the check, but before presentation and payment of the same.<sup>2</sup> The Court said that the check operated as payment, "at least until presentment and refusal which in this case did not happen."

§ 75. **When check is a loan and not payment.** The legal presumption in giving a check is, to pay a debt, but sometimes the purpose is to make a loan. The question occasionally arises in suits on checks, for which of these purposes was it given? This is a question of fact. In one case a person, shortly before his death, gave his check for one hundred dollars to S., who drew the money. It was shown that the maker was a good business man, free from debt, not a borrower of money, and that S. had rendered no service to him. These facts were regarded sufficient to prove that the check was given as a loan.<sup>3</sup>

§ 76. **Lost check.** If a party pay his own debt by a check to the order of his creditor, can he be required to pay again, in the event of its loss by the creditor through accident or fraud, and its payment to the finder or a fraudulent holder on a forged indorsement? "We think this question should be answered in the affirmative unless in some very special case, if such a case can be supposed, where the check was taken in absolute payment and extinguishment of the debt."<sup>4</sup>

<sup>1</sup> Kinyon v. Stanton, 44 Wis. 479.

<sup>2</sup> Getchell v. Chase, 124 Mass. 366.

<sup>3</sup> Stimson v. Vroman, 99 N. Y. 74. A check is *prima facie* a payment, not a loan. Koehler v. Adler, 91 N. Y. 657; Aff. 15 Jones & Sp. 518.

<sup>4</sup> Thomson v. Bank, 82 N. Y. 1, p. 8.

## CHAPTER II.

## ORDER OF PAYMENTS.

THE paying of deposits may be fitly introduced by describing the order in which they are paid. The principle which is most frequently applied to determine this order was announced in Clayton's case.<sup>1</sup>

§ 77. **Priority observed.** (*a*) *Clayton's case.* When an account consists of continuous dealings, like the ordinary bank account, the money is applied on the presumption arising from the priority of receipts and payments. If any other appropriation is to be made, the creditor must declare his intention at the time of payment. "Neither banker nor customer ever thinks of saying this draft is to be placed to the account of the £ paid in on Monday, and this other to the account of the £ paid in on Tuesday. There is a fund of £1000 to draw upon, and that is enough. In such a case there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place, and are carried into the account. Presumably, it is the sum first paid in that is first drawn out. It is the first item on the debit side of the account that is discharged or reduced by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other. Upon that principle all accounts current are settled, and particularly cash accounts. When there has been a continuation of dealings, in what way can it be ascertained whether the specific balance due on a given day has, or has not, been discharged, but by examining whether payments to the amount of that balance appear by the account to have been made? You are not to take the account backwards, and strike the balance at the head instead of the foot of it."

<sup>1</sup> 1 Mer. 572, p. 608 ; *Bodenham v. Purchas*, 2 Barn. & Ald. 39.

(b) *No preference from priority in date.* Mere priority in the drawing of a check will not give the holder a preference in payment over the holders of other checks subsequently drawn.<sup>1</sup>

§ 78. **When checks exceed deposit who shall be paid.** When checks are presented at the same time for more than is owing to the depositor, what shall the bank do? It was said by the Chancellor of New York, in such a case, that its officers are not required to settle the conflicting claims of the check holders.<sup>2</sup> And, if the depositor directs the officers not to pay any of his checks, and he draws his entire deposit for the purpose of dividing it ratably among the several holders, the owner of a check who may have demanded payment after the direction of the drawer to the bank, but before the fund is drawn out, has no claim on the bank.<sup>3</sup> "If the drawer," said the Chancellor, "intended to distribute the remaining funds in the bank ratably among the several holders of the checks, instead of letting some be paid to the exclusion of others, he did right to forbid the payment of any of them, until such an arrangement could be made. . . It would have been contrary to the usages of banks to have accepted and paid any of the checks after the drawer had directed the teller not pay them."<sup>4</sup>

§ 79. **Memorandum checks.** The insertion of the word "mem." in a check on a bank in New York, does not affect its negotiability, or alter the right of the holder to present it to the bank and demand payment immediately. If a bank pays such a check, whereby the funds of the drawer of the bank are exhausted, the holders of the checks, not so indorsed, and which are presented for payment during banking hours on the same day have no legal claim against the bank.<sup>5</sup>

<sup>1</sup> Dykers v. Leather Manufacturers' Bank, 11 Paige, 612.

<sup>2</sup> Id.

<sup>3</sup> "It would be utterly impossible for banks in New York to do business if they were obliged at their peril to settle the conflicting claims of the holders of checks as to rights of priority, arising from the time of drawing such checks." Id.

<sup>4</sup> See § 348. <sup>5</sup> Dykers v. Leather Manufacturers' Bank, 11 Paige, 612.

## CHAPTER III.

## PAYMENT OF DEPOSITS.

*General Principles.*

§ 80. **Duty of bank to pay checks.** “A banker transacting publicly the ordinary business of his calling, receiving daily deposits, and bound to meet with promptness the drafts of his customers, gives the community to understand that those who have funds in his hands have not only the right to draw upon the deposit, but that all drafts will be paid on presentation; he opens virtually a letter of credit to his depositor, which is a guaranty to him, as well as to all who make advances upon the faith of it. For all practical purposes it assimilates itself to a parol promise to accept any check that the owner of the deposit may draw; and thus the rule which binds the drawee of a bill of exchange as an acceptor, when he has promised in advance to honor it furnishes a strong analogy.”<sup>1</sup> While this may be regarded as a correct statement of the engagement between bank and depositor, on better authority it is maintained that the liability of a bank to pay his checks does not become fixed on their mere presentation.<sup>2</sup> But when they are received, and the money is paid to the holder, and they are cancelled and charged to the maker, the payment is complete. Of course, a check can be rescinded by agreement of the bank with the payee.<sup>3</sup> Its possession by the drawee bank is *prima facie* evidence of payment.<sup>4</sup>

§ 81. **When justified in not paying.** A bank is always justified in paying on the order of a depositor, or on the order of

<sup>1</sup> Storer, J., *McGregor v. Loomis*, 1 Disney, 247, p. 251.

<sup>2</sup> *Dickinson v. Coates*, 79 Mo. 250; *Albers v. Commercial Bank*, 85 Id. 173.

<sup>3</sup> Id.

<sup>4</sup> *Wilson v. Goodin*, Wright, Ohio, 219.

any person whom he designates to control the deposit, until its ownership is claimed by another.<sup>1</sup> And if a depositor notifies the bank not to pay his check, and the paying teller promises to regard the notice, but does not, the drawer can recover the amount from the bank.<sup>2</sup>

(a) *Drawer's liability to holder.* When the payment of a check is countermanded, of course the drawer is liable for the consequences of his conduct to the holder.<sup>3</sup> But wherever a check is an assignment of the amount therein specified, the maker cannot countermand payment. In such a case the control of his money passes from him when he issues his check.<sup>4</sup>

§ 82. **Must pay within a reasonable time.** (a) *Remarks of Green, J.* A bank is bound by law to pay a check drawn by a depositor within a reasonable time after receiving it; or, if then having inadequate funds for the purpose, within a reasonable time after receiving them. Says Mr. Justice Green:<sup>5</sup> "A bank is not bound by a legal obligation to the holder to pay or accept a check drawn by a depositor, although there may be funds of the drawer sufficient for the purpose to his credit at the time of presentment. But if it does not pay or accept, it is bound to refuse. It has no right to receive and keep the check indefinitely, thereby leaving the holder to suppose that it has accepted the check and assumed its payment."

(b) *English cases.* "In the cases of *Kilsby v. Williams*,<sup>6</sup> and *Boyd v. Emmerson*,<sup>7</sup> it was held that where the check was drawn upon the persons who were bankers both for the drawer and the payee, the bankers were entitled to one day's time to determine whether they were in funds with which to pay the check, and that by giving notice of refusal on the

<sup>1</sup> *McEwin v. Davis*, 39 Ind. 109.

<sup>2</sup> *Schneider v. Irving Bank*, 1 Daly, 500.

<sup>3</sup> *Albers v. Commercial Bank*, 85 Mo. 173; Aff. 9 Mo. App. 59.

<sup>4</sup> *Union Nat. Bank v. Oceana County Bank*, 80 Ill. 212.

<sup>5</sup> *Northumberland Bank v. McMichael*, 106 Pa. p. 464.

<sup>6</sup> 5 Barn. & Ald. 815.

<sup>7</sup> Ad. & E. 184.

following day, they were relieved from liability merely on the ground that they had retained the check for the one day. These rulings were put expressly upon the ground that the bankers were the agents of the payee to receive payment as soon as the money could be collected, and were therefore entitled to the usual time allowed to collecting agents. In the first of the cases cited the check was paid in without anything being said, or any entry made, but there was a recovery notwithstanding a notice of refusal given the next day, because, during the day sufficient funds were paid in by the drawer to make the check good, and it was held to be the duty of the bankers, as the payee's agents, having retained the check, to apply the first moneys coming in to its payment. In the second case there was no recovery, because the bankers were not placed in funds by the end of the day, and they gave notice of refusal the next day, and this was held to be in sufficient time to relieve them from liability on the mere ground of delay in giving the notice. But in neither of these cases was it intimated that a delay of more than one day would have been tolerated, whether the bankers were in funds or not." In the recent case of *Saylor v. Bushong*,<sup>1</sup> it was held that an acceptance of the check might be implied from the circumstance that in settling the drawer's account the drawee retained an amount sufficient to meet the outstanding check drawn in Saylor's favor.

§ 83. **Effect of crediting depositor with check on depository.** Whenever a bank receives a check drawn on itself by a customer in payment of his debt, and which is charged to his account, "it thereby admits that it has funds of the drawer sufficient to meet the check, and the acceptance is *per se* an appropriation of those funds to the payment of the check."<sup>2</sup>

§ 84. **Bank must pay if deposit be sufficient.** If a bank refuse to pay the check of a depositor drawn on a sufficient deposit he can maintain an action against it for the wrong

<sup>1</sup> 100 Pa. 23.

<sup>2</sup> *Pratt v. Foote*, 9 N. Y. 463, p. 466. See § 18.

done, although no actual damage may have been sustained.<sup>1</sup> Says Judge Trunkey:<sup>2</sup> "If the check has not been revoked, by common usage, the holder expects it will be paid on presentment. He may suffer a real injury by refusal, for which he may be without redress, as in case of the drawer becoming insolvent before recourse to him could be effectual. It would seem that the holder ought to have a remedy against the bank for a wrongful refusal of payment arising from an implied promise from the usages of business, or the course of dealing between the parties. . . If the bank, in violation of its duty, dishonors a check, the holder may be injured quite as much as the drawer, and the bank ought to be answerable to each party injured by breach of the contract."

§ 85. **Part payment of check.** (a) *In Illinois.* If the depositor have an insufficient deposit to pay a check, and the payee is willing to receive whatever is due from the bank, it should honor the check to this extent, crediting the amount thereon.<sup>3</sup> In Illinois, however, a different rule prevails. There, a bank is not required to pay a check unless the drawer's deposit is sufficient to pay the whole amount. The banker is "under no obligation to make a partial payment," for if it did, the check could not be taken and held as a voucher.<sup>4</sup>

(b) *In Massachusetts.* The rule in Massachusetts<sup>5</sup> is: "A check drawn upon a bank for more than the amount of the drawer's funds on deposit creates no lien upon and gives the payee no right to the actual balance until the bank has agreed to pay it *pro tanto*." Hence, if the drawer of such a check should become insolvent before the bank had agreed to pay to the holder whatever balance there might be to the

<sup>1</sup> *Marzetti v. Williams*, 1 Barn. & Ad. 415. In *Birchall v. Third Nat. Bank*, Phil. Com. Pleas, 15 Week. No. Cas. 174, \$600 were given.

<sup>2</sup> *Saylor v. Bushong*, 100 Pa. 23.

<sup>3</sup> *Bromley v. Commercial Nat. Bank*, 9 Phila. 522.

<sup>4</sup> *Coates v. Preston*, 105 Ill. 470, citing *In re Brown*, 2 Story, 502.

<sup>5</sup> *Dana v. Third Nat. Bank*, 13 Allen, 445.



drawer's credit, the bank would be obliged to pay the same to his assignee.

§ 86. **Payment of special deposit.** When funds are deposited for a special purpose, of which the depository is notified, it should not apply them in a different manner. This subject will be fully considered in a subsequent chapter.

§ 87. **Application of deposit to illegal purpose.** A bank cannot apply a deposit to a known illegal purpose, for example, to paying bonds issued by the depositor which have been declared invalid. Thus the court said of a bank in Kentucky that "it could not become the depository of the collected taxes of the people for a valid and legal purpose and, with full knowledge of the illegal and void character of the bonds which had been over-issued, permit the money in its possession to be misappropriated to the discharge of those bonds. To sanction such a principle would allow every trustee of moneys to account for them by the known misconduct of others, and release him from his duty to see that the trust fund under his control is not diverted from the trust with his knowledge and consent."<sup>1</sup>

§ 88. **Payment of post-dated check.** A post-dated check is valid,<sup>2</sup> but a bank should not pay it before the date mentioned; and if it does, the money can be recovered.<sup>3</sup> If transferred by the holder to another for a good consideration before it is due, he may recover of the maker though there was no consideration for the check in the beginning. Thus A. lent his post-dated check to B., the latter agreeing to pay it, and if he did not furnish the money needful, A. was to notify the

<sup>1</sup> Howard v. Deposit Bank, 80 Ky. 496.

<sup>2</sup> Frazier v. Trow's Printing and Bookbinding Co., 90 N. Y. 678; Aff. 24 Hun, 281.

<sup>3</sup> Godin v. Bank, 6 Duer, 76. "Payment of a bill or check before it is due will not be a discharge unless made to the real proprietor of it, and therefore where a banker contrary to usage paid a check the day before it bore date which had been lost by the payee it was held that he was liable to repay the amount to the person losing it." Statement of decision in Da Silva v. Fuller, Sel. Cas. 238, by Shaw, Ch. J., in Wheeler v. Guild, 20 Pick. p. 552.

bank on which it was drawn not to pay the same. Before the check was payable, B. transferred it to C. in payment of an existing indebtedness. C. knew nothing of the agreement. In an action thereon, he recovered against A., the court declaring that its transfer before maturity "afforded no cause of suspicion," while the "consideration of the transfer was sufficient."<sup>1</sup>

§ 89. **Must pay only on indorsement of payee.** (a) *Effect of custom.* The duty of a bank when accepting a check is to pay the same only on the genuine indorsement of the payee. This duty is not affected by a custom among bankers concerning the mode of ascertaining the identity of the person indorsing the name of the payee and receiving payment. If the drawee rely on false representations of identity for which neither the drawer nor payee are responsible, he pays the wrong person at his peril.<sup>2</sup>

(b) *Execution of drawer's intention no excuse for wrong payment.* Nor can a banker justify the paying of a check to a person not bearing the name of the payee on his unauthorized indorsement by showing that he was the person to whom the drawer intended to make payment though ignorant of his intention at the time of paying the check. Nor can the banker prove some facts occurring at the time of drawing the check and exclude others tending to disprove such intention.<sup>3</sup>

§ 90. **Payment of telegraph order.** But if a person should present a telegraph order for money to a bank and represent himself to be the payee, and a man of good character and standing should identify him as the person named therein, and he indorsed his signature to a receipt for the money as correct, the bank would not be negligent in paying him the money although it should be proved that he was not the person named in the order.<sup>4</sup>

<sup>1</sup> Mayer v. Mode, 14 Hun, 155, citing Brewster v. McCardel, 8 Wend. 478; Schepp v. Carpenter, 51 N. Y. 602.

<sup>2</sup> Dodge v. National Ex. Bank, 30 Ohio St. 1; S. C., 20 Id. 234.

<sup>3</sup> Id. See Chap. VI.

<sup>4</sup> Bank v. Western Union Tel. Co., 52 Cal. 280.

§ 91. **Bank excused if publicly forced to pay.** A bank is excused from paying a deposit when it can show that the same has been paid by an authority which it had no right to question nor power to resist.<sup>1</sup> This rule was applied in the following case: M. deposited money in the Bank of Louisiana. The bank and assets were seized by the commanding general of the United States army. In a suit brought by M. to recover his deposit, it was held that as the assets of the bank were delivered to the government in obedience to the order of the commanding general its liability to its depositors ceased.<sup>2</sup>

§ 92. **No recovery of payment to checkholder through mistake of amount of deposit.** If a bank pay a check to an innocent payee supposing that it has funds of the drawer, when in truth it has none, the money cannot be recovered.<sup>3</sup> No principle of law is better known. "It seems to be clearly laid down and settled that a check once credited in the books of a bank is an acceptance, and subjects the acceptor to payment; and that when the check has been actually paid that the bank must look to the drawer for redress, and not to the payee."<sup>4</sup>

§ 93. **No recovery of overpayment to depositor by mistake in final settlement.** If a bank, through mistake, overpay a depositor in settling the account, and the error is discovered, but no effort is soon made to recover the overpayment, it cannot when a subsequent account is opened, two years afterward, charge the overpayment to the depositor.<sup>5</sup> Applying the principle established in Louisiana that a depository is not authorized to apply a deposit to the payment of the depositor's indebtedness without his special mandate, the court

<sup>1</sup> *Grivot v. La. State Bank*, 24 La. Ann. 265.

<sup>2</sup> *Mandeville v. Bank*, 19 La. Ann. 392.

<sup>3</sup> *Hull v. Bank*, Dudley, 259.

<sup>4</sup> *Butler, J., Hull v. Bank*, *supra*, citing *Bentinck v. Dorrien*, 6 East, 199; *Cocks v. Masterman*, 9 Barn. & Cr. 902.

<sup>5</sup> *Hancock v. Citizens' Bank*, 32 La. Ann. 590; the court citing several Louisiana cases.

remarked that "the conduct of the bank in concealing from the plaintiff its discovery of the error alleged, and permitting him, in ignorance of any claim against him, to open a new deposit-account and continue it until he had got hold of enough money to satisfy its claims did not come up to the standard of candor and good faith required in dealings of this nature. It involved a deception, and justified the plaintiff in the expectation and confidence, that his deposits in 1871 would be subject to his order, without which we cannot believe he would have made them. The bank had no right to disappoint this just expectation and confidence by suddenly springing upon its depositor this claim of which he had been kept in ignorance. It was the plain duty of the bank to have notified the plaintiff of the error in its former settlement as soon as discovered, or at the first possible opportunity."

§ 94. **Payment of check through fraud of paying teller.** (a) *Atlantic Bank v. Merchants' Bank.* Sometimes checks are fraudulently paid by a paying teller or other officer. The paying tellers of M. and A. banks conspired with a broker whereby the latter drew his check on the M. bank, where he had no funds, which the paying teller marked "good," and which the broker took to the teller of the other bank, who gave him bank notes therefor. These he took to the M. bank and gave them to the paying teller who put them in his cash to cover a deficit. No other persons knew of the transaction. His cash was counted that afternoon by the directors, approved and returned to him. The next morning he committed suicide; the check was presented to the M. bank by the other and payment was refused. In the end it was obliged to pay.<sup>1</sup>

(b) *Principle more formally stated.* Subsequently, a case very similar was tried by the same court and with the same result. More formally stated the principle is this, if money be fraudulently taken from the owner by his clerk and paid into a bank to its defaulting teller at his request for the

<sup>1</sup> *Atlantic Bank v. Merchants' Bank*, 10 Gray, 532. See *Ingraham v. Maine Bank*, 13 Mass. 208.

purpose of enabling him to exhibit to the bank officers as money of the bank, and thus to conceal his embezzlement, it does not become the money of the bank, although in examining and settling the accounts of the defaulting teller before the discovery of the embezzlement, it was received and counted by the different officers of the bank as the money of the bank and treated as such and put to his credit on the books and afterwards returned to his custody. And the owner may maintain an action to recover the same.<sup>1</sup>

§ 95. **Payment to messenger or agent.** (*a*) *Bristol Knife Company case.* When a check is presented by a messenger or agent of the owner or drawer for payment, what prudence shall the depository exercise in paying it? The treasurer of a manufacturing company sent a check by a messenger to a bank in a neighboring city where it kept an account. The check was indorsed to the order of the cashier. The treasurer, knowing that the messenger was not trustworthy, inclosed the check in a sealed envelope with a deposit ticket. The messenger, however, broke open the envelope and presented the check to the teller of the bank, saying that the treasurer wished him to get the amount in currency to pay the company's hands. The teller called the cashier, showed him the check, and told him that the messenger wanted the money therefor. The cashier asked him who he was, and having replied that he was the brother of the treasurer, whose strong personal resemblance was recognized, the cashier directed the teller to give him the money. The messenger after receiving it disappeared. The company sued the bank for the amount of the check and recovered. One reason why the court decided against the bank was because the check was drawn on another bank. It was found by the court, said Judge Loomis, "that the payment of the money on a check indorsed like this was not the ordinary way of using such checks as between banks and persons having deposit accounts with them, but that the regular course was for the banks to credit the checks to the

<sup>1</sup> *Skinner v. Merchants' Bank*, 4 Allen, 290.

account of the other party, who obtained the avails by drawing their own checks on the bank.”<sup>1</sup> And it was further found that such was the uniform practice and course of dealing between the parties to this suit prior to the transaction in question.<sup>2</sup>

(b) *Bristol Knife Company case.* The case was a very close one, and two of the five judges comprising the court dissented. The remarks of the court on the principal question are worth giving. “Had the messenger who delivered the check at the bank authority from the plaintiffs to receive the money thereon? It is conceded that there was no authority in fact. The only authority of the messenger, in fact, was to deliver to the bank the sealed envelope containing the check and deposit ticket, have the check credited to the plaintiffs, and get the bank-book. He was not in any sense a general agent; he had never done any business for the plaintiffs of any kind, and was an entire stranger to the officers of the bank. He was only a special agent, and that, too, of exceedingly limited authority. And here the familiar and elementary rule of law applies, ‘that an agent constituted for a particular purpose, and under a limited power, cannot bind his principal if he exceeds that power. Whoever deals with an agent constituted for a special purpose, deals at his peril when the agent passes the precise limits of his power.’ We would not, however, adhere so closely to the literal terms of this rule as to do injustice to innocent third parties, who have acted on the confidence of an apparent authority, for which the principal is justly responsible. But, in order to bind the principal, he must, by his words or acts, have fully authorized the third party to believe that the agent had authority, and, in applying this rule to business transactions, care must be used to distinguish clearly between the act of the principal and the mere act of the agent. If the agent by this act assumes an

<sup>1</sup> But the Court of Common Pleas in New York has declared that the payment by a bank of checks drawn on other banks is legitimate banking business, *Murray v. Bull's Head Bank*, 3 Daly, 364.

<sup>2</sup> *Bristol Knife Co. v. First Nat. Bank*, 41 Conn. 421.

appearance of authority which induces a third party to believe he has, in fact, authority, it is not sufficient. It is the principal's own act only that gives to the agent an appearance of which become binding on him."

§ 96. **Payment of checks when money is loaned for specific purpose.** When a person gets a credit from a bank for a specified amount and purpose, it is under no obligation to pay a larger amount by reason of the using by the borrower of a portion of his money for a purpose foreign to that mentioned. In a case involving this principle it was declared that no privity existed between a bank and the person for whom the money was intended when the credit was given whereby he could recover on checks given by the borrower in excess of the amount loaned.<sup>1</sup> But when a bank promised to pay A.'s checks for a cargo of corn, and this fact was told to the seller, and he, relying on the fulfilment of the promise, sold the corn and took A.'s check therefor, the bank was required to pay it.<sup>2</sup> The difference, said the court, between this and the former case was that the promise of the bank to pay the check drawn by the purchaser of the cargo of corn, Allen, was communicated to Nelson, the seller, both by Allen and one of the bank directors; and Nelson's partner, who sold the corn, testified that he knew Allen was not pecuniarily responsible, and that he took his check solely on the credit given by the promise of the bank to pay. If Nelson "had sold his corn merely on Allen's credit, and without any knowledge that the bank had undertaken to pay his checks, there would be no ground for holding it liable on its promise."

§ 97. **Liability for mistaking depositor.** If a bank negligently pay to the wrong person supposing him to be the depositor, it is liable. But whether a bank is negligent in paying a deposit to a person whose name is pronounced like that of another depositor, but spelled differently, is a question of fact to be determined by the circumstances in each case.<sup>3</sup>

<sup>1</sup> First Nat. Bank v. Pettit, 41 Ill. 492.

<sup>2</sup> Nelson v. First Nat. Bank, 48 Ill. 36.

<sup>3</sup> White v. Springfield Institution, 134 Mass. 232. See §§ 179, 180.

§ 98. **Liability for illegal deposit.** If a bank illegally receive money belonging to the State, it must refund the same. Thus, a State treasurer deposited with a bank a portion of the State revenue, the bank, with sureties, agreeing to return the money on demand. The bank having become insolvent, the treasurer sued the sureties, who defended on the ground that the deposit was illegal. But it was decided that whether the bank received the money honestly or through fraud it was liable for the amount, and so were the sureties.<sup>1</sup>

§ 99. **Drawer's death revokes his check.** (a) *Payment without knowledge.* A bank should not pay a check after learning of the death of the drawer; but if paid in ignorance of this event it is not liable.<sup>2</sup> The rule is nearly a hundred years old, and though, as has been maintained, the drawer's obligation to pay is not in truth lessened by his death, nevertheless, the event operates as a revocation of his check. Judge Trunkey remarked in the case of *Saylor v. Bushong*,<sup>3</sup> that "a check may be revoked before presentment by the drawer's death, or by his order not to honor it, but if not revoked it is the duty of the bank to pay on demand. For breach of this duty the drawer has a right of action."

(b) *Where rule does not apply.* But wherever the issuing of a check works an assignment of the maker's deposit, his death does not affect the check. "If the check creates an absolute appropriation of the funds, such appropriation, unless it be a delusion and a sham, must vest some right in the party for whose benefit the appropriation is made. Was it ever before heard, in our jurisprudence, that a right once vested, whether with or without consideration, could be divested by the death of the party from whom it was acquired."<sup>4</sup>

<sup>1</sup> *Harbison v. Bailey*, 114 Pa. —.

<sup>2</sup> *Tate v. Hilbert*, 2 Ves., Jr., 118.

<sup>3</sup> 100 Pa. 23.

<sup>4</sup> *Lewis v. International Bank*, 13 Mo. App. 202, p. 207. The reader may be reminded, however, that the higher court in Missouri does not sanction the doctrine that the issuing of a check works an assignment of the maker's deposit. In *McGregor v. Loomis*, 1 Disney, 247, the court first deciding that the checkholder after notifying the bank held, "the specific fund appropriated by the



§ 100. **Legal payment of check to non-owner.** Is a bank ever justified in paying a deposit to any person than the lawful owner? The following interesting case has been recently decided: Dewar, the owner of money, gave it to his employer, Warrack, for depositing in a bank. Warrack deposited it in his own name, but the bank knew who was the true owner. Warrack indorsed the certificate of deposit to the owner who in turn deposited the same in a safe to which Warrack had access. Afterward, Warrack took the certificate from the safe, struck out the indorsement and drew the money. A few days later, Dewar, learning what had been done, expressed his disapproval both to Warrack and to the bank. Warrack proposed to secure him by a mortgage on land that he owned, which proposition was accepted. But the mortgage was not executed, Warrack delaying the matter by various false pretences for more than three years. During this period, "the indebtedness in question was treated by both Dewar and Warrack as a loan from the former to the latter." The evidence clearly showed this. Consequently, when Dewar finally sued the bank for the money he could not recover.<sup>1</sup>

§ 101. **Payment by draft at depositor's request.** (a) *Risk is depositor's.* Deposits are usually paid in money over the counter of the bank, or through the clearing house, but sometimes a depositor desires to get his deposit by a bank draft. In such a case the risk of transmission is assumed by the depositor. If the bank send it in the usual way by mail, and the letter containing it is properly addressed, the bank is not responsible in the event of loss. In transmitting a draft the bank may adopt the address contained in the letter requesting

terms of the check," also remarked that "the authority to recover the amount represented by the check, cannot be lost to the holder by the death of the drawer before it is presented, or even his insolvency; and should the neglect of the holder have discharged the drawer from his liability, the right to the fund still remains, else the depository would only be freed from all obligation to pay his check, but would retain also the deposit upon which it was drawn."

<sup>1</sup> Dewar v. Bank, 115 Ill. 22.

the remittance, and is not bound to use a more particular designation or mode of address for the purpose of insuring delivery to the proper person.<sup>1</sup>

(b) *English case.* The trustee of a deceased London dress-maker wrote to a creditor in Suffolk asking to be "favored with a check in the course of a week." The check was accordingly sent, but was stolen in transit, the indorsement forged and the amount paid by the bankers on whom it was drawn. A suit was brought on behalf of the creditor's estate, and the question was whether the creditor or the debtor should stand the loss. Baron Huddleston remarked that the post-office was ordinarily considered to be the agent of the sender of the letter, and not of the receiver, and when this was the case the remittance must, of course, be at the sender's risk. The case then proceeds on a familiar principle in the law of carriers, where, if a consignee of goods direct shipments to him in a particular way, the shipment, according to his direction, completes the seller's duty and responsible duty, and places the merchandise at the consignee's risk. As the distance was too great to justify an expectation that the check would be sent by messenger, Baron Huddleston held the debtor was entitled to interpret the request as one to send a check by post. This implied request having been followed, the post-office department was held to be no longer the exclusive agent of the sender, but the common agent of both parties. He therefore entered judgment for the defendant.<sup>2</sup>

§ 102. **Duty of successor to pay predecessor's deposits.** If the business and funds of a bank pass to another the successor is liable to the depositors of the former. "Any other doctrine

<sup>1</sup> *Jung v. Second Ward Savings Bank*, 55 Wis. 364; see *Burr v. Sickles*, 17 Ark. 428; *Gurney v. Howe*, 9 Gray, 404. "Ordinarily, when one person directs another to send him by mail a check for money, and the same is inclosed in a letter properly directed and deposited in the post-office, such a check at once becomes the property of the former, and is thereafter at his risk," *Indiana Nat. Bank v. Holtsclaw*, 98 Ind. p. 87.

<sup>2</sup> *Norman v. Ricketts*, Lond. Bank. Mag. June, 1886, p. 497. For liability for loss of a note or money sent by mail, see *First Nat. Bank v. McManigle*, 69 Ca. 156; *Warwicke v. Noakes*, Peake, N. P. 98.

it seems to us would be monstrous. As well as contend that because one has his name changed by legislative enactment he thereby avoids all obligations incurred in his former name.”<sup>1</sup> So, too, a savings bank, the successor to the business of private bankers who had given a certificate of deposit to A., was held liable for another certificate given by it in lieu of the former.<sup>2</sup> Nor was the bank in the least relieved by proof of the bad faith of its officers in redeeming the certificate of the private bankers mentioned, or relieved from paying other certificates which they had not issued and for which others had been subsequently given.

We shall next consider the principles which apply especially to the payment of deposits to corporations, or to persons in a fiduciary or representative capacity.

### *Corporation Deposits.*

§ 103. **Payment of corporation deposits.** “It is a point of very great importance,” said Lord Hatherly, in an English case, “that those who are concerned in joint-stock companies and those who deal with them should be aware of what is essential to the due performance of their duties, both as customers or dealers with the company, and as persons forming the company, and dealing with the outside world respectively. . . A banker dealing with a company must be taken to be acquainted with the manner in which, under the articles of association, the moneys of the company may be drawn out of his bank for the purposes of the company. . . In this case the bankers were informed that checks might be drawn upon the bank by three of the directors of the company. And the bankers must also be taken to have had knowledge, from the articles, of the duties of the directors, and the mode in which the directors were to be appointed. But, after that, where

<sup>1</sup> Henry, J., *Eans v. Exchange Bank*, 79 Mo. 182, citing *Hopper v. Moore*, 42 Iowa, 563; *Hughes v. School District*, 72 Mo. 643; *Thompson v. Abbott*, 61 Id. 176.

<sup>2</sup> *Citizens' Sav. Bank v. Blakesley*, 42 Ohio St. 645.

there are persons conducting the affairs of the company in a manner which appears to be perfectly consonant with the articles of association, then those so dealing with them, externally, are not to be affected by any irregularities which may take place in the internal management of the company. They are entitled to presume that that of which only they can have knowledge, namely, the external acts, are rightly done, when those acts purport to be performed in the mode in which they ought to be performed. For instance, when a check is signed by three directors, they are entitled to assume that those directors are persons properly appointed for the purpose of performing that function. Of course the case is open to any observation arising from gross negligence or fraud. . . Outside persons when they find that there is an act done by a company, will, of course, be bound, in the exercise of ordinary care and precaution, to know whether or not that company is actually carrying on business, or whether it is a company which has been stopped and wound up, and which has parted with its assets and the like. All those ordinary inquiries which mercantile men would, in the course of their business, make, I apprehend would have to be made on the part of the persons dealing with the company." These remarks, we suppose, will apply with as much force to American banks and bankers in dealing with corporations and other companies. In applying them to the foregoing case, it was decided that a bank which had the funds of a company could lawfully honor the checks of its directors which were signed similar to a form sent by them to the bank without inquiring whether they had been duly appointed to office in conformity with the memorandum and articles of association.<sup>1</sup>

§ 104. **President cannot draw checks.** The president of a corporation is not authorized by virtue of his office to draw checks. This authority, however, may be granted by charter,

<sup>1</sup> *Mahony v. East Holyford Mining Co.*, 33 Law T. 383, p. 386; *Ernst v. Nicholls*, 6 H. L. Cas. 401; *Royal British Bank v. Turquand*, 6 E. & B. 327; *Fountaine v. Carmarthen Railway Co., L. R.*, 5 Eq. 316.

by law, or by the usage of the place where the corporation is doing business. The directors of the New York and Sharon Canal Company were so negligent in depositing its funds that the bank officers supposed the deposit belonged to the president of the company. At the time of making it he left his signature, as is the custom in opening a new account, by which it was to be drawn out. The bank paid moneys on his check, supposing that he had authority to draw them, but was protected by law from paying again on the application of the company to the court to compel a second payment.<sup>1</sup>

*Payments to Executors and Trustees.*

§ 105. **All co-executors must sign.** (*a*) *De Haven v. Williams.*<sup>2</sup> The principles relating to the drawing of deposits by trustees and executors will now be stated. As a co-executor should deposit the money received in that capacity to the joint account of all of the executors, so must they unite in drawing it from the depository. Said Judge Hare, in a well-considered opinion, which was approved by the Supreme Court of Pennsylvania, "It were futile to open a joint account if one of the depositors could withdraw the money. All must, therefore, unite in the receipt or check, in order to discharge the banker; and it follows that he cannot rely on a compromise or release by one as a defence. This is not so much an exception to the rule that a payment to a co-executor discharges the debt, as a return to the general rule, to which that is an exception. The right of each executor to act without the concurrence of the rest, seems to have been the growth of circumstances." After showing why executors had been permitted to divide their duties, he continued: "It results from what has been said that the right of executors to sever in the execution of the trust is a concession to expediency, which should not be made when the case is one for

<sup>1</sup> *Fulton Bank v. N. Y. Sharon Canal Co.*, 4 Paige, 127.

<sup>2</sup> 80 Pa. 48

care and judgment, and it is possible for all to unite without inconvenience. It does not, therefore, exist where a fund arising from the collection or sale of the assets comes to the hands of two or more executors or administrators, or has been deposited to their joint account. Under these circumstances, there is nothing to exclude the principle that persons acting in a fiduciary capacity must concur in every measure affecting the interests which they represent.”<sup>1</sup>

(b) *In England one can sign.* The English rule, however, is different, and a check signed by one co-executor will protect a banker in paying it.<sup>2</sup> So will the check of one of several administrators;<sup>3</sup> or even the check of a co-executor acting under a forged will.<sup>4</sup>

§ 106. **Trustees must all sign.** With regard to trustees, the English law requires all to sign a check for drawing deposits.<sup>5</sup> And if money is paid into a bank on the joint account of persons who are not partners in trade, payment must be made on the authority of all to discharge the bank.<sup>6</sup> If one of them absconds, so that his signature cannot be obtained, a court of equity can order the bank to pay the trust deposit on the check of the remaining trustees.<sup>7</sup>

<sup>1</sup> See *Beltzhoover v. Darragh*, 16 Serg. & Raw. 329; *Mendle v. Guedalla*, 2 J. & H. 259.

<sup>2</sup> *Ex parte Rigby*, 19 Ves., Jr. 462; *Can v. Read*, 3 Atk. 695.

<sup>3</sup> *Pond v. Underwood*, 2 Ld. Raym. 1210; *Prosser v. Wagner*, 1 C. B., N. S., 289; *Clough v. Bond*, 3 M. & C. 490.

<sup>4</sup> *Allen v. Dundas*, 3 Term, 125.

<sup>5</sup> *Stone v. Marsh*, Ry. & M. 364.

<sup>6</sup> *Innes v. Stephenson*, 1 Moo. & Rob. 145. In England, sometimes, before opening an account with a customer, bankers require him to consent to their retaining his checks, and sometimes a check is drawn to be kept by a banker after he has paid the money, as a kind of security for repayment. On one occasion, when three persons signed their respective names to such a check, the liability was declared to be joint, and not a joint and several liability, and that an action could not be sustained against the estate of one of them who, though signing like the others, was in truth a surety, the drawee refusing to pay the money unless this particular person would sign the check, *Other v. Ireson*, 24 L. J., Ch. 654; S. C., 3 Drewry, 177.

<sup>7</sup> *Ex parte Hunter*, 2 Rose, 363; S. C., 1 Mer. 408.

§ 107. **When depositor has private and fiduciary accounts.** What is the duty of the bank to pay the check of a depositor who has a private and a public account, and who is an executor and also a public officer, has been declared by Judge Pardee in an interesting case.<sup>1</sup> The depositor's "money thereby became to such a degree his own, and was to such an extent at his sole disposal, subject to his uncontrolled decision as to the place and manner of temporary keeping, that he could retain both in his personal possession without mark upon either, mingle them in one deposit, transfer the deposit from one account to the other for his convenience in keeping, investing, or paying, without imposing upon the respondent an obligation because of these acts to know or suspect a fraud. Neither by such holding, or deposit, or transfer, is money lost to its own fund. It is not lost nor has a fraud been perpetrated so long as it remains in his possession or at his command, with an intent to answer all demands both of the estate and town; and so long as possession and ability to answer continue in him the intent will be presumed to be united with them. And a check drawn either individually or officially, payable to order or bearer, is so nearly the equal of currency in case of transfer, and performs so many offices of payment, between individuals and executors, between the latter and trustees, and between these again and individuals, without giving any evidence when presented either of the number or character of the transactions of which it has been made a part or of the payments which it has effected, that the law will not charge the officers of a bank with knowledge that a depositor has committed a fraud, nor impose upon them the duty of inquiry, because he has drawn upon a treasurer's account checks payable to himself or to bearer, or has transferred money from it to his own and from his own to it. They are not required to assume the hazard of correctly reading in each check the purpose of the drawer."<sup>2</sup>

<sup>1</sup> Goodwin v. American Nat. Bank, 48 Conn. 550. See § 40.

<sup>2</sup> In each of the following cases—Bodenham v. Hoskyns, 2 De G., M., & G., 903; Colt v. Lasnier, 9 Cow. 320; Duncan v. Jaudon, 15 Wall. 165; Smith v.

§ 108. **Sheriff's deposit.** (a) *Payment of money into court.* If a bank receive a deposit from a sheriff, arising from the sale of land on a legal process, and he dies, it cannot be required to pay the funds into court for distribution. His successor is the proper person to demand and receive the money, and he can be ruled into court for the purpose of distributing it. But if a bank pays the money into court, though not required to do so, and a decree of distribution is made, the bank cannot appeal therefrom, because it has no interest in the matter.<sup>1</sup>

(b) *When sheriff is executor.* If a sheriff be also an executor a deposit to the credit of his official account does not import ownership by a particular person; consequently when conflicting demands are made on such a deposit the bank stands as a mere stakeholder, and has a right to demand indemnity before paying it.<sup>2</sup>

§ 109. **Payment of a trust deposit for a fixed period.** If money is deposited for the benefit of another payable at a fixed period, the bank is bound to pay the same on the arrival

Ayer, 101 U. S. 320; *McLeod v. Drummond*, 17 Ves., Jr., 153—said Judge Pardee in *Goodman v. American National Bank*, 48 Conn. p. 565, "the person compelled to surrender money paid, or assets pledged to or purchased by him, acquired from one known to him to be an executor or trustee, that which he knew to be an asset of the estate or of the trust, with actual knowledge derived from the executor or trustee himself that he intended to use the proceeds of the sale or pledge for the relief of his private necessities; and, as a rule, in cases where the pledgee or purchaser had not knowledge from the declaration of the executor or trustee, we think the courts have not decreed a forfeiture of title unless he had actual knowledge of facts which of themselves afford as convincing evidence of the fraudulent intent as if the executor or trustee had made such declarations to him; as when a trustee, confessedly borrowing for his own use, offers in pledge a certificate of stock in his name as trustee, without any accompanying oral declaration that he had only the title of trustee to the shares; as was presumably the case of *Shaw v. Spenser*, 100 Mass. p. 382. The court compelled the pledgee in such case to accept the declaration of the certificate as the equivalent of a declaration by the person."

<sup>1</sup> *Allegheny Bank's Appeal*, 48 Pa. 328.

<sup>2</sup> *Farmers and Mechanics' Nat. Bank v. King*, 57 Penn. 202.



of that period, nor can it be taken sooner by any legal process against the person for whose benefit the deposit is made.<sup>1</sup>

§ 110. **Title of deposit evidence of ownership.** H. deposited in a bank the proceeds of an excursion to the credit of himself and two others as "trustees of Post 13, G. A. R." The bank paid the deposit to him after notice by the Post not to do so. In a suit by the Post against the bank, the evidence of ownership of the deposit was conflicting. *Prima facie* it belonged to the Post, and the burden of proof was on the bank to show that the money belonged to H. When on the stand he was asked: "Did you receive one-half of the profits of the excursion, a portion of which is the amount in dispute and had you proposed before to the Grand Army of the Republic, that they should have one-half of the profits?" It was decided that this was a pertinent question touching the ownership of the fund.<sup>2</sup>

§ 111. **Bank pays at its own risk after prohibition.** B. employed S. to take timber from his land and to have a lien thereon for his work until payment was made. S. rafted the timber from B.'s land, sold it and took a note in his own name in payment, which was collected by a bank. B. gave the bank notice that the money was his, and not to pay the same to S. and indemnified the bank against harm if refusing to pay the money to S. The bank did nevertheless pay S. but was afterward obliged to pay B. the amount with interest. The court said that as "the property itself was a trust for the benefit of its owner so necessarily became the fund, and it could be followed through any number of transmutations by the owner while ever it could be identified. The bank would of course be entirely justified in paying to a depositor money standing to his credit, if not notified that it belonged to another, and with notice not to pay it on his

<sup>1</sup> Foxton v. Kucking, 55 Me. 346.

<sup>2</sup> Arnold *et al.*, Post No. 13 v. Macungie Sav. Bank, 71 Pa. 287.

check. But where such notice is given, the bank will pay to the depositor at its own risk.”<sup>1</sup>

§ 112. **Bank cannot divert trust fund to reimburse itself.**

(a) *Bridgman v. Gill*.<sup>2</sup> A bank has no right to apply a trust deposit to make itself whole for the trustee's personal indebtedness. In an English case, two trustees deposited a fund with a banking house, and at the same time gave notice that the deposit was a trust fund. The court declared that, from the heading of the account, as well as from the evidence in the case, the bankers had notice of the true nature of the deposit. The person for whom the trustees acted was indebted to the banking house, and, without authority from the trustees, gave a check on the fund to pay his debt. The banking house having appropriated the money, a bill was brought against the concern by the trustees to recover the money. The Master of the Rolls said that the most remarkable thing was that the defendants should have resisted the relief sought. It was “totally immaterial that the defendants had not notice of what the precise trusts were; all that was necessary for them to know was, that this was a trust account, and that the fund was held by the plaintiffs as trustees.”

(b) *Bodenham v. Hoskyns*.<sup>3</sup> In another case a depositor kept two accounts, one in his own name, the other in the name of an estate as agent. Having overdrawn his own, he transferred enough from the other account to make up the deficiency. The court declared that the depositary must refund the amount thus transferred to the owner of the estate.

(c) *In ex parte Kingston*.<sup>4</sup> Gross, a county treasurer, used to pay public moneys into the B. Bank, but kept his private account at the N. and P. Bank, and carried over the police rates to the latter account by checks drawn on the other bank. Afterward he opened a superannuation and also a special ac-

<sup>1</sup> First Nat. Bank v. Baehle, 71 Pa. 213. The bank took indemnity in this case from both parties. Farmers and Mechanics' Nat. Bank v. King, 57 Pa. 202.

<sup>2</sup> 24 Beav. 302.

<sup>3</sup> 2 De G. M. & G. 903.

<sup>4</sup> L. R., 6 Ch. App. 632.

count with the N. and P. Bank. Finally, he opened another account with it, headed Police Account. Some of the items to his credit in this account were ascertained to be county funds, and some were not. The checks which he drew on this account appeared to be drawn only for county purposes. The bank treated all the accounts as one in granting interest, which was credited to G.'s private account. It was also proved that the bank knew of his official position. Like more than one official he absconded, having overdrawn his private and special account and leaving a favorable balance to the other two, the police and superannuation. The bank endeavored to regard all the accounts as one, and to retain enough from the two last to balance the amount due on the private and special account, but the court would not permit this to be done.

§ 113. **Liability of bank for misapplying trust fund.** When a bank participates with the trustee in misapplying a trust fund, it is liable to the beneficiary for the loss.<sup>1</sup> In *Loving v. Brodie*<sup>2</sup> advances were made to the trustee. They were demand loans to the payment of which the trust funds, derived from the sale of real estate and in other ways, were applied. These demand loans, remarked the court, were in effect permissions to the depositor to overdraw, and if the trust funds when paid in were absorbed by these overdrafts, the demand loan was thus paid. "We are not prepared to say," continued Judge Devens, "that permitting a trustee to overdraw, and then to pay the overdraft by the proceeds of trust property which he has a right to sell, necessarily makes the bank responsible for the money thus overdrawn, if it be misused by the trustee. Had the trustee sold the real estate, which he had authority to do, and deposited the proceeds with the bank, there being no balance against him, and had he then drawn out the money and devoted it to his own use, the bank would certainly not be responsible. It is not shown, in regard to the bank account, that any advances were made

<sup>1</sup> *Bank v. Clapp*, 76 N. Car. 482.

<sup>2</sup> 134 Mass. 453, p. 469.

to Brodie, trustee, under such circumstances that the bank was fairly put upon inquiry whether they were or were not to be used for other purposes than those of the trust, and thus that it should be made responsible for the fraud committed by him on the estate."

§ 114. **How far beneficiary can follow trust fund.** (a) *When rule does not apply.* Whenever a trust fund has been perverted, the *cestui que trust*, or person for whose benefit the fund was created, can follow it as far as it can be traced.<sup>1</sup> But if an officer of a bank, without due security, should lend its money to a partnership of which he was a member, and it should become mingled with the other property of the concern, this rule could not be invoked for its recovery.<sup>2</sup>

(b) *How beneficiary can treat trustee.* It may be added that "whenever a trustee, unless properly authorized to do so, puts the fund in such shape as to invest himself with a legal title to it, the *cestui que trust* has his election either to treat the fund, according to the appearance of things, as the property of the trustee, and regard the latter as his debtor, or he may demand that the title be transferred to him. If a deposit is made in such manner as, on the face of the books of the bank in which the deposit is made, to authorize the trustee, his assignee, or legal representative, to claim it as the fund of the depositor, the *cestui que trust* has the option to do likewise.<sup>3</sup>

<sup>1</sup> United States v. State Bank, 96 U. S. 30.

<sup>2</sup> Case v. Beauregard, 1 Woods, 126.

<sup>3</sup> Mitchell, J., Naltner v. Dolan, Ind. Sup. Ct., 26 Am. Law Reg., N. S. 25, citing Market v. Smith, 33 Kansas, 66; McAllister v. Commonwealth, 30 Pa. 536; Morris v. Wall, 3 Id. 319; Jackson v. Bank, 10 Id. 61; School District v. First Nat. Bank, 102 Mass. 174; Utica Ins. Co. v. Lynch, 11 Paige, 520; Bartlett v. Hamilton, 46 Me. 435. Judge Mitchell further added in the above case that "in case it becomes the duty of an agent or trustee to deposit money belonging to his principal, he can escape the risk only by making the deposit in his principal's name, or by so distinguishing it on the books of the bank as to indicate in some way that it is the principal's money. If he deposit in his own name, he will not, in case of loss, be permitted to throw such loss on his principal, Williams v. Williams, 55 Wis. 300; Norris v. Hero, 22 La. Ann. 605; Mason v. Whitthorne, 2 Cold. 242; Jenkins v. Walter, 8 Gill & J. 218; Robinson v. Ward, 2 Car. & P. 59; Macdonnell v. Harding, 7 Sim. 178;

*Attaching Creditors of Depositor.*

§ 115. **Bank cannot pay attached deposit.** As a deposit is a debt due from the bank to the depositor, it may be attached by his creditor like any other property belonging to him.<sup>1</sup>

*McIntosh v. Greensdale*, 6 Northeast Rep. 926. In such a case the good faith or intention of the trustee is in no way involved. Having, for his personal convenience, or from whatever motive, deposited the money in his own name, thereby vesting himself with a legal title, it follows, as a necessary consequence, when loss occurs, he will not be permitted to say, as against his *cestui que trust*, that the fact is not as he voluntarily made it appear."

"The rule in equity is well settled," said Judge Boynton, in the case of *Shaw v. Bauman*, 34 Ohio St. 25, p. 32, "that if a trustee deposits the funds of a trust estate in bank in his own name, individually, with his own private funds, he thereby becomes debtor to the trust estate and a creditor of the bank; and in case the trust funds are lost through the insolvency of the bank, the trustee becomes individually liable for the loss, *Wren v. Kirton*, 11 Ves., Jr., 377; *Macdonnell v. Harding*, 8 Eng. Ch. 177; In the matter of *Stafford*, 11 Barb. 353; *Brown v. Rickets*, 4 Johns. Ch. 303. Where a sheriff collected money under an execution, and of his own accord deposited the same in a bank which failed, he was held liable to the plaintiff in execution, *Phillips v. Lamar*, 27 Ga. 228. In *Robinson v. Ward*, 2 Car. & P. 59, it was held that where an attorney, having in his hands the money of his client, places the same to his private credit at his banker's, he will be liable to the client for the amount, if the bank fail, although he does so *bona fide*, and has a large sum of money of his own at the bankers. *Abbott, C. J.*, said: 'If the person having the money mixes it with his own, he thereby makes himself, personally, debtor to the estate. Here the defendant has mixed this money with his own by paying it to the credit of his private account at his bankers, and he is, therefore, liable in this action. This is a very hard case, and all suspicion against the defendant is quite out of the question; but one of two innocent parties must lose the money, and, under the circumstances of the case, I think the plaintiff is entitled to a verdict.' " And in Wisconsin if an administrator deposit in his own individual name funds of the estate in a bank which afterwards fails, the loss is his own and not that of the estate, even though he had no other funds there and informed its officers at the time of making the deposit that the funds were held by him in trust, *Williams v. Williams*, 55 Wis. 300; *Matthews v. Brise*, 6 Beav. 239; *Massey v. Banner*, 1 J. & W. 241; *Commonwealth v. McAllister*, 28 Pa. 480; S. C., 30 Id. 536. Many other cases are reviewed or cited in *Williams v. Williams, supra*. See also *Ward v. School District*, 10 Neb. 293.

<sup>1</sup> *Frazier v. Erie Bank*, 8 Watts & Serg. 18; *Stair v. York Nat. Bank*, 55 Pa. 364; *Harrisburg Bank v. Tyler*, 3 Watts & Serg. 373; *Bank v. Macalester*, 9 Pa. 475; *Smuller v. Union Canal Co.*, 37 Id. 68.

But an attaching creditor gains no right over the depositor's money not possessed by the depositor himself.<sup>1</sup>

(a) *Cases on the subject.* A foreign attachment against Jackson was served on the Bank of the United States as garnishee. Afterward Jackson, acting as agent for third persons, deposited cash in his own name with the bank, and at his request it purchased and discounted drafts drawn by him in his own name, though in fact as agent, which were paid by his principal. Jackson drew out the funds by his check and applied them in the business of his principal. The bank was declared to be liable to the attaching creditor, although the jury found that all the funds were deposited and drawn out by Jackson as agent for others.<sup>2</sup> In another case an English firm drew a draft on Naser, payable at his place of business in New York, and gave it to McCulloch & Co., who transmitted it to the First National Bank of New York, for collection. Before the draft became due Naser began an action against the English firm, and immediately after paying the draft attached the proceeds as a debt due from the bank to the English firm. The bank disputed the validity of the attachment on the ground that it was the debtor of McCulloch & Co. and not of the firm. The court, however, did not sustain this claim, but decided that Naser acquired a valid lien on the proceeds of his draft by his attachment.<sup>3</sup>

§ 116. **Attachment of principal's deposit for agent's debt.**  
(a) *Bank of Northern Liberties v. Jones.*<sup>4</sup> Whenever a deposit is made by one as "agent," it is, in the absence of contrary evidence, the property of his principal, and can be attached only for his debt. The case of the Bank of Northern Liberties v. Jones, which illustrates this point, is also quite important, for the banking practice described by the court. For a long time Thomas C. Jones had deposited there in the name of "Thomas C. Jones, agent." A firm, J. & C., sued

<sup>1</sup> Farmers & Mechanics' Nat. Bank v. King, 57 Id. 202.

<sup>2</sup> Jackson v. Bank, 10 Pa. 61.

<sup>3</sup> Naser v. First Nat. Bank, 36 Hun, 343.

<sup>4</sup> 42 Pa. 536.

Jones and garnished the bank, by which process it was required to state whether it had any money belonging to him. The bank as garnishees, and the parties whose money, deposited by Jones as agent, had been attached, offered to prove that the deposit consisted of various sums, belonging partly to persons for whom Jones was acting as agent, and partly to an estate of which he was the executor. The court which first tried the case refused to admit the testimony, but the Supreme Court held otherwise, thus deciding that a deposit made by one as "agent" belongs to his principal, and cannot be taken for an agent's debt. "If there had been separate accounts," said the court, "each headed as the agency account of such an estate or person, which is certainly the safer mode for all parties, and is perhaps the only really correct one, there could have been no doubt that no creditor of the agent could have attached a farthing of either of any of the funds so ear-marked." After maintaining that the evidence should have been admitted, the court add, "the case, however, illustrates the propriety of opening separate accounts appropriately designated, so that each fund may be distinctly ear-marked, and thus prevent all difficulty in case of death, failure, or any accident destroying the evidence of identity under a general agency account. It is proper to say that such an account as the present, not designating the individuals who are the real owners of the money deposited, should be avoided, both by the bank and its customer, and I am informed by the cashier of one of the oldest banks of large capital in this city, that his institution invariably refuses to open an account with the addition of an 'agent,' or 'attorney,' to the proper name of the depositor."

(b) *Judge Strong's opinion.* In another Pennsylvania case,<sup>1</sup> a collector of rents deposited the money of his principal in a bank in his own name, which was attached by a creditor of the depositor. Immediately afterward notice of ownership was given to the bank. "It is undeniable," said Judge

<sup>1</sup> *Farmers & Mechanics' Nat. Bank v. King*, 57 Pa. 202.

Strong, "that equity will follow a fund through any number of transmutations, and preserve it for the owner so long as it can be identified. And it does not matter in whose name the legal right stands. If money has been converted by a trustee or agent into a chose in action, the legal right to it may have been changed, but equity regards the beneficial ownership. It is conceded, for the cases abundantly show it, that when the bank received the deposits it thereby became a debtor to the depositor. The debt might have been paid in answer to his checks, and thus the liability have been extinguished, in the absence of interference by his principals, to whom the money belonged. But surely it cannot be maintained that when the principals asserted their right to the money before its re-payment, and gave notice to the bank of their ownership, and of their unwillingness that the money should be paid to the agent, his right to reclaim it had not ceased."

**§ 117. Effect of certified check before attachment.** The making of a check which is afterward certified, and is outstanding in the possession of the drawer, does not so change the ownership of the deposit as to exempt it from attachment. The liability of a bank in such a case to hold the deposit subject to the attachment lien can be removed only by showing that the check was made in good faith and that the deposit was paid to a *bona fide* holder, or that the check is in the possession of such holder. When the funds of a depositor have been attached the bank has an active duty to perform in the matter and cannot escape liability when, by inaction, it allows the attached fund to be removed from its possession.

(a) *The case of Gibson v. National Park Bank*, in which the foregoing principles were stated, is worth describing. Prior to April, 1875, a railroad company had a deposit account with the bank. The deposits were made by an officer, Rodney, whose official position was known by the bank. On the day above mentioned, the company, through this official, drew a check for the amount of its balance, which was certified by the bank, charged to the company, and the check was delivered to Rodney. On the 30th of April, an attachment



against the company was served on the bank by delivery of a copy of the document and proper notice. The check was then in Rodney's possession and was owned by the company. Shortly after the attachment was made, Rodney opened an account with the bank in his own name and deposited the check described and other securities belonging to the company. The bank had reason for believing that the securities belonged to the company, that they were to be applied in payment of its debts, and they were, in truth, applied in this manner. The bank was declared liable to the person who attached them. The court said: "When the officers of this bank had notice of the service of the attachment, it was their duty to take immediate steps to impound the funds in their hands, and prevent their payment by any of its agents, except to a *bona fide* holder of its obligations. It cannot shield itself from liability by alleging the ignorance of the agent making the payment while other agents having authority and owing a duty to act in the premises had knowledge of the facts which made such payment a violation of duty on the part of the corporation. The circumstances certainly raised a presumption of knowledge in the bank which required explanation on their behalf. It was, therefore, quite significant that no officer of the bank was produced to testify his ignorance of the fact that these securities belonged to the railroad company, or that the bank supposed it was paying them in good faith to a *bona fide* holder when they gave Rodney an individual credit for them. The facts relating to the point in dispute being peculiarly within the knowledge of the defendant, the presumption arising from their omission to furnish such goes strongly to support the finding of the referee, [which was 'that the bank had reason to and did believe when the deposit was made, that the funds composing it were the property of the railroad corporation.'] That the defendant had notice of the purpose for which this deposit was transferred was properly found by the referee as a natural inference from the knowledge which it had of the embarrassment of the railroad company, their acknowledged desire to avoid

the service of an attachment upon their funds and the previous efforts of the creditors to reach them by legal process."<sup>1</sup>

§ 118. **When a check can be paid after attachment.** When the balance due a depositor is attached, the bank cannot deduct his outstanding check which has not been presented and accepted prior to the attachment proceeding.<sup>2</sup> But whenever a check drawn on a bank is an assignment of the amount specified, it follows that a check drawn by an attachment debtor before the service of such process, though not presented for payment until afterward, should be paid by the drawee bank.<sup>3</sup> A note, though, on which an attachment debtor is liable, which is discounted by a bank before the service of attachment process, and matures afterward, cannot be paid from the debtor's funds at his request without presenting the same to the maker for payment.<sup>4</sup>

§ 119. **Deposit of certified check can be garnished.** If a bank receive from a depositor a check on another bank indorsed "for deposit," and which is afterward certified, it becomes liable to the depositor as though it had received the money, and is liable to garnishment in a suit by a creditor of the depositor.<sup>5</sup> But if a check be deposited for collection, the bank is not liable to garnishment while it remains uncollected.<sup>6</sup>

§ 120. **Duration of lien.** Garnishment operates as a lien from the time of service on any money or effects of the debtor in the possession of the garnishee, and by no act of the debtor, or of the garnishee, or of both, can the lien be defeated.<sup>7</sup> If an assignment be declared void, money deposited before the depository or assignee was garnished can be applied to the debt which the assignor owed the depository.<sup>8</sup>

<sup>1</sup> *Gibson v. National Park Bank*, 98 N. Y. 87, p. 95 ; first trial, 89 N. Y. 343 ; and 49 N. Y. Sup. Ct. 429.

<sup>2</sup> *Harry v. Wood*, 2 Miles, 327.

<sup>3</sup> *National Bank v. Indiana Banking Co.*, 114 Ill. 483 ; *Reeve v. Smith*, 113 Id. 47.

<sup>4</sup> *National Bank v. Indiana Banking Co.*, *supra*.

<sup>5</sup> *National Com. Bank v. Miller*, 77 Ala. 168.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Pollock v. Okolona Sav. Institution*, 61 Miss. 293.

§ 121. **Attachment not defeated by outside acceptance.** A verbal acceptance of a check by the cashier away from the bank is not effective. A garnishee process, therefore, served on the bank by the depositor's creditor after such an acceptance and before the amount has been transferred on the books of the bank will hold the money.<sup>1</sup> Nor will the statement of the bank clerk prior to an attachment levy to the holder of a check that it shall be paid, avail anything, for such a promise cannot bind a bank.<sup>2</sup>

§ 122. **How long should bank hold disputed deposits.** Whenever deposits are garnished standing in the name of a depositor, the bank is justified in holding them until the determination of the suit even though they should be claimed by the wife of the depositor as her property.<sup>3</sup> If not holding them until the question of title is settled, the bank may be obliged to pay a second time. Thus, the plaintiff, a wife, deposited money with a banker, and afterward, in a suit against her husband, he and the banker were garnished. The court found that the deposit was the property of the husband, whereupon the banker without further action by way of interpleader or otherwise paid the amount into court. Subsequently, it having been proved that the deposit belonged to her, the banker was obliged to pay again.<sup>4</sup>

§ 123. **Deposit in non-owner's name to avoid creditors.** (a) *Greenleaf v. Mumford.*<sup>5</sup> When money is deposited by A. in his own name belonging to B. in order to prevent B.'s creditors from getting it, what is the duty of the bank if they attempt to recover the deposit? In New York a person named Greenleaf obtained an attachment against the property of Mumford, which the sheriff attempted to satisfy by levying on money deposited in the Nassau Bank. It had been deposited in the name of Oakey, who had drawn checks against

<sup>1</sup> Bullard v. Randall, 1 Gray, 605.      <sup>2</sup> Duncan v. Berlin, 60 N. Y. 151.

<sup>3</sup> Ferguson v. Bank, 25 Kansas, 333.

<sup>4</sup> Crumb v. Treiber, Cayahoga Dis. Ct., Ohio, 4 Bull. 616; S. C., 2 Clev. Rep. 25. See § 150.

<sup>5</sup> 50 Barb. 543.

it to his own order, which had been certified and left undorsed in the bank. Both Oakey and the bank at first denied that the money was Mumford's property, or subject to the attachment. The justice before whom the case was first tried held that the money was deposited for Mumford and belonged to him, and that the drawing and certifying of the checks was a device for screening the money from Mumford's creditors, and to defeat the levy of the sheriff. The Supreme Court at general term reversed the decision, declaring that, however fraudulent the transaction between Mumford and Oakey might be, Greenleaf could only attach the fund as a debt of the bank to Mumford, while the facts showed that "the debt arising from the deposit in the bank by Oakey and the credit given by the bank to Oakey was a debt of the bank's to Oakey, and not a debt of the bank's to Mumford."

(b) *Review of the case.* It should be noted that the court did not assert that the money was beyond the reach of any process by Mumford's creditors. The court simply decided that the sheriff could not maintain his action. It may be added that the opinion expressed the minds of two judges, while the third judge dissented. The previous year, in another case the same court, though composed of other judges, had said that "it appears to be wholly unnecessary and without authority that an action to collect, protect, or remove obstructions to the collection of intangible assets, should be prosecuted in the name of the creditor. The sheriff, or the creditor in his name, can maintain every necessary action to collect the debts due to the defendant in the attachment, and for that purpose can make fraudulent assignees and claimants of such debts parties to the action, and thus overcome fraudulent transfers and obstructions."<sup>1</sup> Clearly justice is more likely to be satisfied by endowing the officers of the law who collect judgments with the broader authority which they are declared to have by the court in the latter case. In any event, as the controversy is not over the rights of creditors

<sup>1</sup> *Mechanics & Traders' Bank v. Dakin*, 50 Barb. p. 593.

to reach money fraudulently deposited in order to keep it from them, but only over the way or remedy for reaching it, the prudent course for a bank is not to pay until the question of ownership is authoritatively settled.<sup>1</sup>

§ 124. **Deposits held subsequent to attachment.** In a case in Maryland, Nicholson was in the habit of purchasing and advancing money on drafts drawn by Delcher. Sometimes the money was paid to Delcher, at other times he left it with Nicholson, the latter agreeing to hold it for the use of persons named by Delcher, and to be paid to them on the presentation of his checks. Delcher having been sued, an attachment was served on Nicholson by Delcher's creditor. After the service of the attachment, Delcher continued to leave money with Nicholson as before, and which was paid by him to the persons named by Delcher in his checks. The question was, whether the money deposited by Delcher with Nicholson was liable to attachment at the instance of Delcher's creditors; and the court held that in Maryland the attachment secured not only the property of Delcher in the hands of Nicholson at the time it was laid, but also such other property belonging to Delcher as came into Nicholson's hands at any time before trial and judgment.<sup>2</sup> "We take the law to be well settled," said the court, "that where money is deposited by A. with B. for the use of C., the right of C. to the money is not complete until C. has in some manner recognized or assented to the deposit, or unless there is a privity of contract of some kind between B. and C. Until such assent or privity of contract the money is subject to the control of A., and therefore liable to attachment at the instance of his creditors."<sup>3</sup> The money, therefore, deposited

<sup>1</sup> See also *Kelly v. Lane*, 42 Barb. 594; *Lawrence v. Bank of the Republic*, 35 N. Y. 320; *Mechanics & Traders' Bank v. Dakin*, 28 How. Pr. 502.

<sup>2</sup> *Nicholson v. Crook*, 56 Md. 55; *First Nat. Bank v. Jagers*, 31 Id. 38; *Farmers and Merchants' Bank v. Franklin Bank*, 31 Id. 404.

<sup>3</sup> *Kelly v. Roberts*, 40 N. Y. 432; *Brown v. Foster*, 4 Cush. 214; *Baker v. Moody*, 1 Ala. 315; *Briggs v. Block*, 18 Mo. 281; *People v. Johnson*, 14 Ill. 342.

by Delcher with Nicholson after the attachment belonged to him; it was in his power, at any time before the assent of the parties to the deposit, to revoke the terms on which it was made, and Nicholson was obliged to pay over the same on the attachment process.

§ 125. **Attachment of borrowed money.** Borrowed money which has been deposited can be attached like any other deposit. A person in Massachusetts obtained money of S. and deposited it in a bank in his own name. On the same day, however, he drew out his deposit in bills of the bank, and subsequently deposited them or other bills of the same bank in his own name as before. S. sought to recover the money, but the court held that it belonged to a person who had attached it after the borrower had made the second deposit.<sup>1</sup>

### *Principal and Agent.*

Under this head two questions have arisen: First, when can a bank retain the deposits made by an agent to extinguish his indebtedness to itself; and, secondly, when should it pay them to the principal instead of the agent. We shall consider the last question first.

§ 126. **When principal can claim deposit made by agent.** When an agent deposits to his own account the proceeds of property sold by him for his principal, under instructions to keep it in this manner, a trust is impressed thereon in favor of the principal, and his right is not affected by the fact that the agent at the same time deposits other money belonging to himself, nor by the fact that the agent, instead of depositing the identical money received by him on account of his principal, substitutes other money. In *Van Alen v. American Nat. Bank*<sup>2</sup> it was suggested on the argument that notice to the bank by the depositor was necessary to protect the rights of the plaintiff, but, said Church, C. J., "this is not

<sup>1</sup> *Fuller v. Randall*, 1 Gray, 608.

<sup>2</sup> 52 N. Y. 1, p. 10.

so. The title of the plaintiff does not depend upon whether the bank knew he had a title or not. That rested upon other facts. A notice to the bank might have prevented any transfer or the creation of a lien by the depositor, or prevented the bank from taking or acquiring such lien in good faith, but could not otherwise be necessary or important."

**§ 127. Bank is protected in paying deposit through ignorance.**

But if the bank does not know that the deposit is fiduciary, it cannot be held liable to the principal in the event of a subsequent misapplication of the deposit by his agent. C. was in the habit of indorsing and sending checks to his agent in New York for payment. The latter indorsed them properly and deposited them in a bank, but without disclosing his agency. They were credited to his account, and he drew checks for the amount which were certified and paid. After the failure of the agent his principal sued the bank, but did not recover.<sup>1</sup>

**§ 128. When bank is protected in knowingly paying agent.**

(a) *City Bank v. Kent*.<sup>2</sup> If an agent have a general power of attorney to collect money for his principal, which is deposited in a bank to the principal's credit, and he then draws the deposit on checks purporting to be signed by the principal and believed by the officer of the bank to be genuine, the bank is discharged, whether the checks are genuine or not; they are, in effect, receipts and acquittances in the name of the principal. Moreover, the agency continues so long as the power is not revoked and the business is not withdrawn from the agent's control. Said Judge Bleckley: "We think the officers of the bank were well justified in treating checks as genuine which were presented by the agent, bearing the name of his principal. Such checks were sufficient receipts and acquittances for the money paid out by the bank upon them. Besides, the element of ratification is in the case; and while it does not go directly to the checks, it does go to the general

<sup>1</sup> Case *v. Mechanics' Bank Association*, 4 N. Y. 166.

<sup>2</sup> 57 Ga. 283, p. 303.

fact of use and control of the money by the agent. It is not improbable that the agent deceived his principal and abused his powers. But did he transcend the powers apparently conferred upon him? We think not. The bank did not select the agent. The principal selected him, and held him forth as his representative. If the agent's infidelity is to injure either, the bank, we think, should not be the victim."

(b) *When liable.* In the following case, though, the bank was justly held liable for the wrong-doing of the agent. A. had a large amount of specie consigned to him, which he took to a bank for the purpose of depositing until he received instructions from his principal. The officers advised him to deposit the specie in his own name during the interval for the sake of greater convenience in drawing it out. Afterward, he applied a portion to pay his indebtedness to the bank; but this it was obliged to refund to the principal.<sup>1</sup>

(c) *Notice of principal to the bank.* If a bank pay the checks of an agent without interference of the principal, of course, it is protected. But when he asserts his right to the deposit and gives notice of his ownership and of his unwillingness to have payment made to his agent, the latter's right to draw the deposit ceases.<sup>2</sup>

§ 129. **Principal's deposit cannot be taken for agent's debt.** So, too, when a bank has notice of the ownership of the deposit from the principal it cannot be taken by the agent's creditor, or by any other person intending to make a wrongful use of the same.<sup>3</sup> A case arose in Pennsylvania, involving the principle.<sup>4</sup> A bank issued its own check at the request of Gray, and it was charged to Gray's account. He was the agent of Frankish, and had on deposit at the time more than the amount of the check. Frankish afterward informed the cashier of the bank of Gray's unfaithfulness and desired that he would not pay the check mentioned if presented by one of

<sup>1</sup> *Commercial Bank v. Jones*, 18 Texas, 811.

<sup>2</sup> *Farmers, etc., Bank v. King*, 57 Pa. 202.

<sup>3</sup> *Morrill v. Raymond*, 28 Kansas, 415.

<sup>4</sup> *Penn Bank v. Frankish*, 91 Pa. 339.



three persons, naming them. The cashier, while willing to do anything he could to protect Frankish, nevertheless paid the check to one of the three persons on his affidavit that he was the holder for a consideration. Frankish sued the bank to recover, and the jury returned a verdict in his favor, which, except "for a single error," said the higher court, "might have stood." The judge who charged the jury had said: "If you believe the testimony in regard to Gray's transactions then the burden of proof is on the bank to show that they did pay the money over to a *bona fide* holder for value." "This," said the Supreme Court, when reviewing the case, "was laying a burden on the bank it was not entitled to bear. The check in question was the bank's own check, that is, it was issued by the cashier at the request of Mr. Gray, against whose account it was charged. The check was strictly commercial paper and every holder is presumed to be a holder for value. . . Does the mere fact that the bank had been informed by Frankish of Gray's fraud, and of his suspicions that Howells was in collusion with him, accompanied with a request not to pay the money to Howells, change the burden of proof? . . It is sufficient to say there was not enough in the case to throw upon the bank the burden of showing the *bona fides* of Howells's holding. It had a right to rely upon the presumption in his favor. The burden of showing that Howells was not a *bona fide* holder rests upon those who assert it."

§ 130. **Duty of bank when principal becomes a lunatic.** A bank cannot refuse to pay an agent on the ground that his principal has become a lunatic until this fact has been established by a competent tribunal. "Although the authority of an agent may be revoked by the lunacy of his principal yet the existence of the lunacy, before it can have that effect, must be established by inquisition. There would be no safety in admitting any other evidence of a fact which is to have an operation so extensive; and sound policy requires us to adopt this rule."<sup>1</sup>

<sup>1</sup> Per curiam, *Wallis v. Manhattan Company*, 2 Hall, 495, p. 499.

§ 131. **Proof must be clear to recover.** When the principal seeks to recover a deposit made by an agent and in his own name, the proof must be clear in order to maintain the case. Hence, when A., the managing owner of a vessel, was permitted by the other owners to have the possession of, two orders of a company payable to the bearer which A. deposited with his bankers and received the money thereon, it was held that the other partners could not recover the deposit in a suit brought after A.'s death, because it was not shown that the deposit had been made on their account.<sup>1</sup>

§ 132. **Recovery of identical money.** Even the identical money deposited by an agent may be recovered if the bank knew that it belonged to the principal;<sup>2</sup> for example, money kept labelled in the principal's name.<sup>3</sup> And if the deposit be thus made in the name of the principal the law presumes that it is the identical money received by the agent on account of his principal.<sup>4</sup>

§ 133. **Auctioneer's deposits.** If an auctioneer deposit the proceeds of goods sold by him to his own credit, their owners have no special claim on the funds; they are merely creditors of the depositor.<sup>5</sup> And if a sale be not completed the purchaser cannot recover interest on his deposit with the auctioneer until after making demand.<sup>6</sup>

§ 134. **Liability of bank when acting as agent.** Whenever a bank is the agent for keeping or sending the funds of a principal, it is liable for abusing the trust. Thus, O'Hare deposited money with the defendant bank for transmission to the Henry Bank, this fact appearing on the ticket which accompanied the deposit. The defendant bank transferred the money to the Northwestern Bank for the purpose of further transmission to the Henry Bank, but withholding all knowledge of its trust character. The Henry Bank having

<sup>1</sup> *Sims v. Bond*, 5 Barn. & Ad. 389.

<sup>2</sup> *Grand Trunk R. v. Edwards*, 56 Barb. 408.

<sup>3</sup> *Beatty v. McCleod*, 11 La. Ann. 76.

<sup>4</sup> *Beatty v. McCleod*, *supra*.

<sup>5</sup> *Levy v. Cavanagh*, 2 Bosw. 100; *Marten v. Rocke*, 53 Law T. Rep., N. S. 946.

<sup>6</sup> *Walsh v. Meyer*, 3 N. Y. State Rep. 579.

failed, the Northwestern Bank applied the money in question to its indebtedness against it. O'Hare then sued the defendant bank for the amount and recovered.<sup>1</sup>

§ 135. **Bank cannot retain principal's money for agent's debt.** (a) *National Bank v. Insurance Company.*<sup>2</sup> In answering the second question relating to agency deposits, when a bank seeks to assert its lien against a fiduciary account for a personal obligation of the depositor and contracted for his private benefit, it must be held as having notice that the fund represented by the account is not the individual property of the depositor, if it really consists in whole or in part, of funds held by him in a trust relation.<sup>3</sup> Although the relation between bank and depositor is that merely of debtor and creditor, and the balance due on the account is only a debt, yet the question is always open, to whom in equity does it belong? If the money deposited belongs to a third person, and is held by the depositor in a fiduciary capacity, its character is not changed by placing it to his credit in his bank account. Therefore, the third person can recover the money if he can identify it. This applies to all trust property. A court will follow money even if put into a bag or an undistinguishable mass by taking out the same quantity. Accordingly, when a bank account was opened in the name of a depositor as "general agent," the bank knowing that he was the general agent of an insurance company, and that the money deposited was principally for premiums on policies collected by him for the company, the bank was declared to be chargeable with notice of the equitable rights of the company, although he deposited other money in the same account and drew checks on it for his private use.<sup>4</sup>

(b) *Sir George Jessel's opinion.* In the above-mentioned

<sup>1</sup> *Drovers' Nat. Bank v. O'Hare*, 18 Brad. 182; Aff. by Ill. Sup. Ct., 19 Chic. Leg. N. 180.

<sup>2</sup> 104 U. S. 54.

<sup>3</sup> *Cook v. Tullis*, 18 Wall. 332; *Neely v. Rood*, 54 Mich. 134, p. 136.

<sup>4</sup> In *Burnett v. First Nat. Bank*, 38 Mich. 630, the court cited a large number of authorities on the subject.

insurance case the court referred to *Knatchbull v. Hallett*,<sup>1</sup> in which the subject was fully considered. Sir George Jessel, the Master of the Rolls, showed, said Judge Mathews, that the modern doctrine of equity as regards property disposed of by persons in a fiduciary position, is that, whether the disposition of it be rightful or wrongful, the beneficial owner is entitled to the proceeds, whatever be their form, provided only he can identify them. If they cannot be identified by reason of the trust money being mingled with that of the trustee, then the person for whom the trustee is acting is entitled to a charge upon the new investment to the extent money is traceable into it; that there is no distinction between an express agent and an agent, or bailee, or collector of rents, or anybody else in a fiduciary position; and that there is no difference between investments in the purchase of lands, or chattels, or bonds, or loans, or moneys deposited in a bank account.<sup>2</sup>

### *Partnership Deposits.*

§ 136. **How partnership account must be entered.** A partner has no implied authority to open a banking account on behalf of the firm in his own name.<sup>3</sup> And if the partnership business is carried on in the name of one partner, the other may insist that the deposits shall be kept in the name of the partnership. This rule is needful for their individual protection. And if an account is opened with a bank by one of two partners in his own name, this is not conclusive to show that the account was opened in his own behalf. The bank can prove that it was acting as the agent of the partnership, and that the account was theirs. The mere circumstance, however, that the money deposited belonged to the partnership is not sufficient for the purpose.<sup>4</sup>

<sup>1</sup> L. R., 13 Ch. Div. 696.

<sup>2</sup> See § 171, *c, f.*

<sup>3</sup> *Alliance Bank v. Kearsley*, L. R., 6 C. P. 433; S. C., 40, L. J., C. P. 249.

<sup>4</sup> *Cooke v. Seeley*, 2 Ex. 745.

**§ 137. Deposit cannot be drawn on individual partner's check.**

A partnership deposit cannot be drawn out on the check of an individual partner. If a bank should pay such a check from the firm's deposit, it could justify itself only by showing that the money was applied to the use of the firm. A partner did once draw from a bank on his individual check partnership money, saying at the time that the form of the check was a mistake, that the money was drawn on joint account, and directing the bank to pay it and similar checks which he might draw thereafter. The bank was declared to be without excuse in paying it.<sup>1</sup> Nor can a new partner transfer a deposit of the old firm to his individual account without their authority.<sup>2</sup>

**§ 138. English rule.** Mr. Grant has thus stated the English rule: In the absence of a special agreement fixing the mode of drawing checks on the partnership fund, the depository must honor checks not post-dated drawn in the partnership name, but not otherwise.<sup>3</sup>

**§ 139. Power of surviving partner.** On the death of a partner the survivor can draw a check for the partnership deposit either in the partnership name or in his own as surviving partner.<sup>4</sup>

**§ 140. Application of deposits after partner's death.** If "the partnership is in debt, and the surviving partners continue their dealings with a particular creditor, and the latter joins the transactions of the old and the new firm in one entire account, then the payments made from time to time by the surviving partners must be applied to the old debt. In that case, it is to be presumed that all the parties have consented that it should be considered as one entire account, and

<sup>1</sup> *Coote v. Bank*, 3 Cranch C. C. 50.

<sup>2</sup> *Ex parte Hanson*, 18 Ves., Jr., 232.

<sup>3</sup> P. 30; *Forster v. Mackreth*, L. R., 2 Ex. 163; *Kirk v. Blurton*, 9 Mees. & Wels. 284; *Emly v. Lye*, 15 East, 7; *Nicholson v. Ricketts*, 29 L. J., Q. B. 55.

<sup>4</sup> *Commercial Nat. Bank v. Proctor*, 98 Ill. 558; *Backhouse v. Charlton*, L. R., 8 Ch. Div. 444.

that the death of one of the partners has produced no alteration whatever.' This rule was applied in *Simson v. Ingham*.<sup>1</sup> At the time of the death of a partner in a country bank, it owed a considerable balance to a London banking house. The course of business was for the latter house to send to the other a monthly account of receipts and payments. During the month succeeding the death of the deceased partner the London house received more than enough to pay the balance due from the other; on the other hand, it advanced on account of the country bank as much as it received. At first, the London bank entered in its books all receipts and payments after the death of the partner to the account of the old firm, but did not transmit any account to the country bankers until two months after that event. Then two accounts were sent, one of them containing the dealings of the old firm to the death of the partner, and the other all subsequent payments and receipts. It was held that the entries in the books of the London house did not effect a complete appropriation by it of the several payments to the old account, nor could they have this effect until knowledge of them had been communicated to the country house. The London house, therefore, notwithstanding the entries it had made, could apply the payments received subsequently to the death of the partner to the new firm.<sup>2</sup>

§ 141. **Application of deposits of new partnership.** If a new partnership be formed, the depository cannot apply their deposits to pay an overdraft of the old one whenever notice of the change has been given. They must be used in paying the checks of the new partnership.<sup>3</sup>

§ 142. **Inquiry into transfers and signatures of checks.** Concerning the right of a bank to make inquiry into a partnership account and the mode of signing checks, it may be

<sup>1</sup> 2 Barn. & Cr. p. 72.

<sup>2</sup> See *Cox v. Troy*, 5 Barn. & Ald. 474.

<sup>3</sup> *Richardson v. International Bank*, 11 Brad. 582.

said that if each partner has a right to draw on the account and also has an individual account at the same place, the depository has no right to inquire into the propriety of the transfer of money from one account to another.<sup>1</sup> But if the name of the partnership be inaccurately stated in their check the depository ought not to cash it without inquiry, unless the inaccuracy is habitual, or an agreement exists to honor checks thus drawn.<sup>2</sup>

§ 143. **Liability on check given after dissolution.** (a) *Rule stated by Miller, J.* A retiring partner may be liable on a partnership check given after the dissolution to one who had no notice of his retirement. The rule, as stated by Judge Miller,<sup>3</sup> is, "That credit already raised on the face of the partnership is presumed to be continued on the same footing, unless special notice of a change be given; and as every partner knows, or has the means of knowing, who are the persons with whom his firm has transacted business and from whom it has received credit, public policy and natural justice alike demand that he should give to every such party personal and special notice of the withdrawal of his responsibility."

(b) *Facts in Rose v. Coffield.*<sup>4</sup> What will be regarded as notice to a person dealing with a partnership is a question of fact to be decided in each case. In *Rose v. Coffield*, a notice of dissolution of the firm was published in the newspapers on the sixteenth of the month, and several days afterward. A person who held a note against the firm on the twenty-ninth of the same month renewed it to the second of December on receiving a check payable that day. The check was not paid, and he sued thereon and recovered against all the partners after proving that he had not learned of the dissolution of the partnership.

<sup>1</sup> *Backhouse v. Charlton*, L. R., 8 Ch. Div. 444.

<sup>2</sup> *Kirk v. Blurton*, 9 Mees. & Wels. 284.

<sup>3</sup> *Rose v. Coffield*, 53 Md. 18, p. 26, citing *Vernon v. Manhattan Co.*, 22 Wend. 183; *National Bank v. Norton*, 1 Hill, 572. See also *Wardwell v. Haight*, 2 Barb. 549; *Clapp v. Rodgers*, 12 N. Y. 283.

<sup>4</sup> 53 Md. 18.

*Payment of Joint Deposits.<sup>1</sup>*

§ 144. **Payment of joint deposit to survivor.** (a) *Whitlock case.* When a deposit is made in the name of two persons, and one of them dies, can it be safely paid to the survivor? In New York, such a deposit was made by a husband and wife, and paid to the latter on the death of her husband. It may be assumed, said the court, that the widow was not entitled to receive the debt created by the money which her husband had deposited with the bank, and that the sole fact of payment to her would not have protected it from further liability. But after she drew the money she was appointed administratrix on his estate, and that appointment related back to the time of his decease and confirmed and legalized her act in demanding and receiving payment of the debt.<sup>2</sup>

(b) *O'Keefe case.* In another case the plaintiff and her nephew O'K. opened a deposit account with a savings bank. When the first deposit was made, the plaintiff stated to the officers of the bank in O'K.'s presence, that "either of them or both could draw the money." The usual savings bank pass-book was issued, in which the deposit was entered to the plaintiff's credit "or" of O'K., and the account on the books of the bank was kept in the same manner. One of the rules printed in the pass-book provided that all payments to persons producing the pass-book should be valid to discharge the bank. Subsequently, deposits were made by both depositors, and in their mutual presence. On the death of O'K., the plaintiff informed the officers of the bank of the event, and that O'K.'s wife had the pass-book, and notified them not to pay the money to her. Nevertheless, the bank, on presentation of the book and letters of administration issued to Mrs. O'K. on the estate of her husband, did pay to her the whole deposit. The court decided first, that the right of the bank to pay on the separate order of either of the depositors, and of each to demand payment, did not terminate by the death

<sup>1</sup> See § 40.

<sup>2</sup> *Whitlock v. Bowery Savings Bank*, 36 Hun, 460.



of O'K.; secondly, that as his authority was coupled with an interest, it vested, on his death, in his personal representative; but, thirdly, that the plaintiff having given notice of her right to the fund, and prohibited the payment of it to O'K.'s representative, the bank had no right to pay to Mrs. O'K. only so much of the deposit as had been contributed by her husband.<sup>1</sup>

(c) *In Platt v. Grubb*<sup>2</sup> the court said: "By reason of the unity of husband and wife in the view of the law an obligation taken in the name of both enures to the benefit of both, and the whole goes to the survivor."<sup>3</sup>

§ 145. **Whose money is drawn on single depositor's check.** If one draws against a fund composed partly of his own money and partly of the money of another, the presumption is that the check is for his own money, whatever may be the relative dates of the deposit. "Of course, the presumption can be overturned by evidence, but where there is no evidence, we think such is the presumption."<sup>4</sup>

### *Payment of Wife's Deposits.*

§ 146. **Bank can pay wife's check if not knowing that she is married.** If a wife deposit money in her own name and the bank does not know that she is a married woman, it can safely pay her on her check. Nearly sixty years ago a case arose in New York in which the plaintiff's wife was entrusted with moneys and directed to deposit them in a bank. Accordingly she opened an account with the defendant bank in her own name, and from time to time made deposits. She also informed the bank in what manner she desired to have the deposits drawn, and it complied with the direction. The bank had no knowledge that she was a married woman until

<sup>1</sup> *Mulcahey v. Emigrant Industrial Savings Bank*, 89 N. Y. 435.

<sup>2</sup> 48 Hun, 447.

<sup>3</sup> *Bertles v. Nunan*, 92 N. Y. 152; *Sanford v. Sanford*, 45 N. Y. 723; second trial, 58 Id. 69.

<sup>4</sup> *Hall v. Otis*, 77 Me. 122.

after it had paid all the checks and closed her account. The husband then attempted to recover on the ground that payment to his wife was unauthorized. The judge submitted the fact to the jury whether the wife was authorized as the agent of her husband to do what she had done, or whether he had subsequently ratified her acts, and they found a verdict for the bank. The Superior Court reviewed the case, speaking through Judge Oakley, who said: "The plaintiff entrusted the wife with the money for the purpose of depositing it. He knew that she was in the habit of making deposits, and though he might not have known that she had opened an account in her own name, as he was unable to read the entries made in her bank-book, it is fairly to be presumed that he must have known that she was also in the habit of drawing checks for the money deposited. She was entrusted with the bank-book, and the husband never made any inquiry as to the state of the account in the bank, and the jury were well justified in drawing the inference that he must have known the true state of the case. But if the jury were incorrect in finding the fact of an authority by the husband, on the evidence in the case, it is still clear that the plaintiff has no right to recover. If the wife abused the trust reposed in her by her husband, the [bank] ought not to suffer by her fraudulent act, in depositing the money in her own name. By entrusting her with the money he enabled her to commit the fraud, and the loss, if he has sustained any, must fall upon him. In the absence of any circumstance to charge the bank with notice that she was a married woman, they had a right to open an account with her as a *feme sole*, and to pay the checks drawn upon the deposits made by herself."<sup>1</sup>

§ 147. **By modern law bank can knowingly pay.** Even though a bank does know that a female depositor in her own name is married, it can lawfully pay her. A deposit was made by a wife in an Arkansas bank, and though her husband never claimed it, the lower court in that State pre-

<sup>1</sup> *Dacy v. N. Y. Chemical Manufg. Co.*, 2 Hall, 550.

sumed as matter of law that it belonged to him. But the Supreme Court said that "there is no such legal presumption, at least with regard to money and securities that are transferable by delivery. There, for the benefit of trade, a property is created in the bearer. A bank note or a coin may have been stolen, yet one who takes it in good faith for value may hold it against the loser. Possession is evidence of ownership, and the burden of proof is on the party who assails the possession.<sup>1</sup> . . . If the law were otherwise than we have declared it, no bank could with safety receive the deposits and pay the checks of a married woman."<sup>2</sup>

§ 148. **Payment of wife's deposit to husband.** In another suit brought by a married woman to recover the amount of a deposit, she proved the indorsement and delivery to her husband of two checks (belonging to her and payable to her order) for the purpose of having them deposited in her name with the defendant bank. She then produced a bank-book in which the amount of the checks was credited to her. The bank tried to prove that at the time of the first deposit it was orally agreed between the plaintiff's husband and the bank that the deposit should be made to the plaintiff's credit on condition that it might be withdrawn by her husband on check in her name, that the second deposit was similarly made, and that the deposits were subsequently withdrawn in this manner. The court excluded this evidence, holding that the request of the husband to have the deposit made in her name and to her credit, and the issuing of the pass-book to her, taken in connection with the checks which were made payable to her, disclosed clearly the husband's agency; that authority to sign his wife's name to future checks could not be inferred from the fact of his making the deposits; and that the bank could not prove an arrangement with him hostile to

<sup>1</sup> *Murray v. Lardner*, 2 Wall. 110.

<sup>2</sup> *German Bank v. Himstedt*, 42 Ark. p. 64; second trial, 46 Id. 537. See § 40, *a*.

her interests and beyond the apparent scope of the agency without proof of actual authority from her.<sup>1</sup>

§ 149. **When husband is not wife's agent.** A delivery by a wife to her husband of a check payable to the order of a third person does not necessarily constitute the husband the wife's agent to receive the money. The delivery may be made for other reasons, or with an express direction not to collect the same. Accordingly, when a husband had such a check in his possession and he said to the payee that his wife had given it to him and that he wished to get it cashed, and the payee did so, and collected the money of the drawee bank, in an action by the wife against the payee, her husband's statement to him could not be introduced as evidence against her. She therefore recovered the amount.<sup>2</sup>

§ 150. **Bank should not pay her deposit on trustee process against him.** In an action by a married woman against a savings bank for her deposit, the bank admitted that it was in her name, but that a part had been paid under a trustee process against her husband. She "testified that the money was her own, and her husband, who seems to have been supposed by the bank to have been her principal and the then depositor, disclaimed the funds. This evidence," continued the court from whose opinion we are quoting, "fully warranted a finding that the plaintiff was the creditor of the bank," and therefore entitled to the deposit.<sup>3</sup>

<sup>1</sup> *Bates v. First Nat. Bank*, 89 N. Y. 286; *Aff.*, 23 Hun, 420. See § 156 (c). In Maryland, in an action on a check signed by a married woman, *per* her husband, the plaintiff closed his case without showing any authority by the husband to sign the check. By reason of the statutory rights of a married woman in that State, the check holder could not recover. *Wilderman v. Rogers*, 7 Eastern Rep. 786.

<sup>2</sup> *Hunt v. Poole*, 139 Mass. 224.

<sup>3</sup> *Townsend v. Webster Five-Cents Sav. Bank*, Mass. Sup. Ct., 9 Northeast. Rep. 521.

*Payments to Donees.*

§ 151. **Two kinds of gifts.** (a) *Both described.* When the depositor has given his deposit, or a check therefor to another, the bank must pay the same to the recipient of the gift. The law recognizes two kinds of gifts: *inter vivos* and *donatio causa mortis*. An *inter vivos* gift contains two elements: the intention to give and delivery of the thing in question. "To constitute a *donatio mortis causa*," says Judge Foster,<sup>1</sup> "there must be three attributes: (1) the gift must be with a view to the donor's death; (2) it must be subject to the condition that it shall take effect only on the donor's death by his existing illness; and (3) there must be a delivery of the subject of the donation." The same principles it is said apply to both kinds;<sup>2</sup> nevertheless their application has not been uniform as will appear in the review of some of the cases in the following pages.

(b) *Gift of checks first considered.* With respect to the subject of the gift we are concerned only with two things, checks and deposits. The legal principles relating to the gift of checks will be first considered.

§ 152. **Payment essential.** (a) *Simmons v. Cincinnati Savings Society.*<sup>3</sup> On one occasion the drawee of a check delivered it to the payee intending to make a gift of the fund on which the check was drawn. Was the gift complete? "It seems clear to us," said White, C. J., in *Simmons's* case, "that until the check was either paid or accepted the gift was incomplete; and that in the absence of such payment or acceptance, the death of the drawer operated as a revocation of the check. It is well settled that, in order to constitute a valid gift, there must be a complete delivery of the subject of the

<sup>1</sup> *Kenistons v. Sceva*, 54 N. H. p. 37.

<sup>2</sup> *Pennington v. Gitting's Executor*, 2 Gill & J. 208; *Minor v. Rogers*, 40 Conn. 512.

<sup>3</sup> 31 Ohio St. 457; *Aff.* 2 Bull. 278; *Hewitt v. Kaye*, L. R., 6 Eq. 198; *Second Nat. Bank v. Williams*, 13 Mich. 282.

gift, either actual or constructive. The check in the present instance was a mere order or authority to the payee to draw the money." So, too, the making and delivering of a check, for safe-keeping, to the payee, payable six months after the maker's death, is not an *inter vivos* gift, nor a trust which equity will enforce.<sup>1</sup>

(b) *Gift of bank-book and order.* A depositor in a savings bank gave the bank-book and an order for payment of the deposit to her daughter; who notified the bank of the transaction. The depositor died and the bank paid the deposit to the administrator on her estate. This was subsequently declared to be a gift, and the bank was obliged to pay the same to the donee. "The delivery of the book and order by the mother to the daughter constituted a valid gift *inter vivos*; and this gift, being notified to the bank, was a complete assignment of her right to the fund."<sup>2</sup>

(c) *Check given and taken back.* A father put a check into the hands of his son nine months old, saying, "I give this to baby for himself," and then took back the check and put it away. He also expressed his intention of giving the amount of the check to his son. Shortly afterward the father died, and the check was found among his effects. It was held that there had been no gift to or valid declaration of trust for the son. Lord Cranworth, L. C., said: "When there has been a declaration of trust, then it will be enforced whether there has been consideration or not. Therefore the question in each case is one of fact; has there been a gift or not, or has there been a declaration of trust or not? I should have every inclination to sustain this gift, but unfortunately I am unable to do so; the case turns on the very short question whether Jones intended to make a declaration that he held the property in trust for the child; and I cannot come to any other conclusion than that he did not. I think it would be of very

<sup>1</sup> Appeal of Waynesburg College, 111 Pa. 130; Trough's Estate, 75 Id. 115.

<sup>2</sup> Gray, J., Foss v. Lowell Five-Cents Sav. Bank, 111 Mass. 285; Kingman v. Perkins, 105 Id. 111; Kimball v. Leland, 110 Id. 325.

dangerous example if loose conversations of this sort, in important transactions of this kind, should have the effect of declarations of trust.”<sup>1</sup>

(d) *Check deposited and drawn against.* A husband drew a check payable to his wife, or her order, and gave it to her shortly before his death. She indorsed it and paid it into a foreign bank and afterward drew against the amount. This was held to be a good *donatio causa mortis*, although the check was not presented for payment at the bank on which it was drawn until after the death of the donor.<sup>2</sup> In a Missouri case, however,<sup>3</sup> it was questioned whether a *donatio causa mortis* could be made of a check on a bank. If it could, certainly delivery was essential.

§ 153. **Law in New York.** In New York this subject was considered in *Curry v. Powers*.<sup>4</sup> It was declared that “a check payable at a future day, does not have the effect to transfer the money of the bank on which it is drawn before it becomes due, and is not a valid gift.” In that case C. gave each of his sons a check on a savings bank payable four days after his death, and also his bank-books. But the gift was not sustained, because neither the delivery of the checks nor the books operated to transfer his deposits. “The drawer,” said the court, “had a right to make other checks, and thus he retained control of the fund until his death, in accordance with his expressed intention, that he might draw the interest.” Moreover, as the amount deposited exceeded that specified in the checks, the delivery of the books was for safe-keeping, inasmuch as the balance belonged to his estate.<sup>5</sup>

§ 154. **Law in Louisiana.** In Louisiana the plaintiff’s testator, the day before his death, delivered a check to the defendant with the intention of giving it to her. It was

<sup>1</sup> *Jones v. Lock*, L. R., 1 Ch. App. 25. “A. promised to give a bank certificate to B., afterward B. found the certificate in a room usually occupied by both of them; this was not regarded a delivery.” *Buschian v. Hughart*, 28 Ind. 449.

<sup>2</sup> *Rolls v. Pearce*, L. R., 5 Ch. Div. 730.

<sup>3</sup> *Walter v. Ford*, 74 Mo. 195.

<sup>4</sup> 70 N. Y. 212.

<sup>5</sup> See *Cox v. Hill*, 6 Md. 274.

drawn by another to the testator's order and indorsed by him in blank. The check was not presented for payment until after the testator's death. This was declared to be a valid gift. But if the check had been drawn by the testator, and he had died before its presentation, it would have been worthless, because by his death his mandate to his agent, the bank, was revoked.<sup>1</sup>

§ 155. **What is an inter vivos gift of deposit.** A person acting freely and with full knowledge has the power to make a voluntary gift of his property. This no one will question, nor will the assertion be questioned that a mere intention, whether expressed or not, is insufficient to make a gift, while a voluntary promise to make one is *nudum pactum*, and of no binding force.<sup>2</sup> To make a gift, said Church, C. J., in *Martin v. Funk*,<sup>3</sup> "the act constituting the transfer must be consummated and not remain incomplete, or rest in mere intention." Delivery of possession is essential.<sup>4</sup>

§ 156. **First rule.** *If the donee be present when the deposit is made and the bank-book is given to him and accepted, this is conclusive evidence of an intention to give and an acceptance of the gift.*<sup>5</sup>

(a) *Camp's appeal.*<sup>6</sup> In a Connecticut case the donor gave his bank-book to the donee saying, "Keep this book until I call for it, and if I never call for it it is yours." This was declared to be a gift. Judge Carpenter said that, "A gift *inter vivos* is complete when there is an intention to give, accompanied by a delivery of the thing given and acceptance

<sup>1</sup> *Burke v. Bishop*, 27 La. Ann. 465.

<sup>2</sup> *Kekewich v. Manning*, 1 De G. M. & G. 176, and cases cited.

<sup>3</sup> 75 N. Y. p. 137.

<sup>4</sup> *Grangiac v. Arden*, 10 Johns. 293. Money in a bank does not pass by delivery of pass-book. *Ashbrook v. Ryon*, 2 Bush, 228. In Maine the court, in *Robinson v. Ring*, 72 Me. 140, p. 144, said, "There must be an intention to give and this must be carried into effect by an actual delivery," citing *Taylor v. Fire Department*, 1 Edw. Ch. 294; and *Brabrook v. Boston Five-Cents Sav. Bank*, 104 Mass. 228.

<sup>5</sup> *Sweeney v. Boston Five-Cents Sav. Bank*, 116 Mass. 384.

<sup>6</sup> *Camp's Appeal*, 36 Conn. 88.



by the donee. There can be no doubt as to the intention to give and the acceptance. The only question is was there a legal delivery." And the judges were unanimous in thinking there was.<sup>1</sup>

(b) *People v. State Bank*.<sup>2</sup> O. made a deposit to the credit of his wife, notifying the cashier that the money was his, and that he would let the amount rest in that way for a short time. Subsequently she drew checks on this account which were paid. After her death and before an administrator had been appointed, by agreement with the cashier O. overdrew his account and the checks were paid from the deposit mentioned. Not long afterward a receiver of the bank was appointed, and O. then applied to have the overdraft set off against the deposit and the balance transferred to his credit. His application was denied on the ground that the deposit to his wife's credit and acceptance by her, which was signified by drawing checks against it, operated as a gift, and consequently he could not reclaim it, nor could the bank deny its liability to her estate.<sup>3</sup>

(c) *Hunt v. Poole*.<sup>4</sup> A wife made a check payable to a third person and delivered it to her husband expecting that he would deliver it to the person specified by her as payee. The wife's object was to get money from the bank through the agency of another person than her husband. When delivering it, however, the husband told the third person that his wife had given him the money and desired him to cash the check, which he did. The third person afterward presented the check to the bank and received the money. She then sued him for the amount and recovered. He attempted to introduce her husband's statement above mentioned to prove a gift to him but this was not permitted.<sup>5</sup>

§ 157. **Second rule.** *Delivery of the book need not be formally made if the donee has possession of it.* Chief Justice Durfee remarked in *Providence Institution v. Taft*,<sup>6</sup> that while "there

<sup>1</sup> Camp's Appeal, 36 Conn. 88. See also *Brown v. Brown*, 18 Id. 410.

<sup>2</sup> *People v. State Bank*, 36 Hun, 607.

<sup>3</sup> *People v. State Bank*, Id.

<sup>4</sup> 139 Mass. 224.

<sup>5</sup> See § 149.

<sup>6</sup> 14 R. I. 502.

are cases which hold that a delivery is so essential to a gift that it cannot be dispensed with even when the donee is already in possession,<sup>1</sup> there are other cases, however, more numerous, and in our opinion more authoritative, which hold that a delivery is not necessary when the intended donee is already in possession, but that in such a case the gift, if completed and unambiguous, may be effected by a simple oral declaration.<sup>2</sup> In *Penfield v. Thayer*<sup>3</sup> the donee and donor boarded at a house; the latter was a woman, and dependent on the donor's bounty, and he paid her board and manifested a disposition to befriend and protect her. On one occasion, when going not far away, to New York City, he said to her, "My trunk and what is in it I give to you; there is enough in it to take care of you for life," or "for a spell," adding that he wished her son to have his tool chest. It appeared that he had no expectation of returning, but he did return, took possession of his room and used his tools. His death occurred soon afterward; she then took possession of his trunk which contained a bank-book. This was decided to be hers.

§ 158. **Third rule.** *A gift can be made without delivering the book to the donee and consequently payment may be demanded without producing it*<sup>4</sup> *To make a gift in such a case the deposit must be put in the name of the donee with the intention of giving it to him, and must be accepted* In a case of this kind the court said: "If the donor made the deposit and kept the book for the plaintiff, intending it as a gift to her, the gift would not be perfected until accepted by the donee; and acceptance implies a mutual act of the parties, or an

<sup>1</sup> *Shower v. Pilck*, 4 Ex. 477; *Cutting v. Gilman*, 41 N. H. 147; *French v. Raymond*, 39 Vt. 623.

<sup>2</sup> *Tenbrook v. Brown*, 17 Ind. 410; *Wing v. Merchant*, 57 Me. 383; *Carradine v. Carradine*, 58 Miss. 286; *Southerland v. Southerland*, 5 Bush, 591; *Waring's Adm'r v. Edmonds*, 11 Md. 424; *Stevens v. Stevens*, 2 Hun, 470; and see *Winter v. Winter*, 9 W. R. 747; S. C., 101 Eng. C. L. 997; *Roberts v. Roberts*, 15 W. R. 117.

<sup>3</sup> 2 E. D. Smith, 305.

<sup>4</sup> *Blasdel v. Locke*, 52 N. H. 238.

act by one assented to by the other, equivalent to an acceptance of a chattel upon delivery. An act would perfect the gift of the legal interest which, had the deposit been in the donor's name in trust, would have been sufficient to perfect the gift of the equitable interest.<sup>1</sup> An acceptance and a completed gift might be inferred from the fact that the donor informed the donee of the gift with the express or implied assent of the donee. Any act or speech between the parties which should show mutual understanding that the gift was made would be sufficient evidence."<sup>2</sup>

§ 159. **Fourth rule.** *The acceptance need not be at the time of making the deposit.* This can be done afterward. In the Scott case, previously mentioned, "the deposit was made without the knowledge of the donee, and the deposit-book was retained by the donor." The intention of the donor to make a gift was declared to be open to inquiry, the acceptance of it by the donee completed a contract between her and the bank, but this could not be presumed, it must be shown. "If," said the court, "the evidence shows that the donor intended that the deposit should belong to the donee, and received and held the book for her until acceptance by her, it shows a completed gift, even though it might have been revoked before acceptance."

§ 160. **Fifth rule.** *Before acceptance, the depositor may act as trustee in keeping the book for the donee and without his knowledge ; or, the depositor may regard the book as delivered to and accepted by himself as trustee from the time of receiving it from the bank.*<sup>3</sup> Indeed, the depositor can act as well in the

<sup>1</sup> Gerrish v. Bedford Institution, 128 Mass. 159.

<sup>2</sup> Scott v. Berkshire Co. Sav. Bank, 140 Mass. 157, p. 166.

<sup>3</sup> Id. 157 ; Martin v. Funk, 75 N. Y. 134. "A delivery to a donee of a savings bank-book, containing entries of deposits to the credit of the donor, with the intent to give the donee the deposits represented by the book, is a good delivery to constitute a complete gift of such deposits (Camp's Appeal, 36 Conn. 88). Such delivery vests the equitable title in the donee without assignment. The delivery may be to the donee or to some other person for

capacity of trustee to accept the deposit for the donee as any other person.

(a) *Thus in Minor v. Rogers*,<sup>1</sup> the depositor put money in a savings bank and received a deposit-book in which she was described as "Mary Daniels, trustee of William A. Minor." At the time of making the deposit she informed Minor's father of what she had done, but before her death she drew the deposit. In a successful action by Minor against her administrator to recover it, Judge Park, who delivered the opinion of the court, said: "It is evident that she did all that she thought necessary to be done to perfect the gift, and supposed that she had accomplished the object. . . If she had made the deposit in the name of the plaintiff alone, or had made some other person than herself trustee for the plaintiff, no question could have arisen regarding the completeness of the gift. But the beneficial interest is as much given as it would have been if either of these modes had been adopted. The deposit is made in the bank for the plaintiff, and the bank is informed of the fact. Here is a delivery of the beneficial interest. No more would have been done if the deposit had been made in the name of a third party for the plaintiff."

(b) *Wheatley v. Purr*.<sup>2</sup> The settlor instructed her bankers, with whom she had a deposit of three thousand pounds, to place £2000 in the joint names of the plaintiffs and her own, as trustee for the plaintiffs. They entered the sum in their books to the account of the settlor as trustee for the plaintiffs, or order, fourteen days after sight. A receipt for the amount was signed by the settlor and given to the bankers. The trust was held to be effectually created, although no notice of it was communicated to the donee.

(c) *Opinion of Rhode Island Supreme Court*. "The creation of the trust, if otherwise unequivocal, is not affected by the

the donee," *Hill v. Stevenson*, 63 Me. 364, citing *Dole v. Lincoln*, 31 Id. 422; *Marston v. Marston*, 21 N. H. 491; *Borneman v. Sidlinger*, 15 Me. 429; *Wells v. Tucker*, 3 Binn. 366.

<sup>1</sup> 40 Conn. 512.

<sup>2</sup> 1 Keen, 551.

settlor's retention of the instrument of trust, especially where he is himself the trustee."<sup>1</sup>

§ 161. **Sixth rule.** *Whether, while holding the book, the depositor is acting as trustee, or for himself, is a question of fact to be determined by proper evidence in each case.*<sup>2</sup>

(a) *Leading New York case.*<sup>3</sup> Some of these cases we shall now review. In the leading New York case, Mrs. B. deposited in a savings bank declaring at the time of so doing that she wanted the account to be in trust with the plaintiff. The account was so entered and a pass-book was delivered to the intestate, Mrs. B. A second deposit was also made in trust for another person, sister of the other. Mrs. B. kept the pass-books, and the interest, except for one year, remained in the bank, until her death. Neither of the sisters knew of the deposits which Mrs. B. had made in trust for them. Chief Justice Church, who delivered the opinion of the court, quoted with approval Lord Chief Justice Turner's opinion in *Milroy v. Lord*.<sup>4</sup> "In order to render a voluntary settlement valid and effectual the settlor must have done everything which according to the nature of the property comprised in the settlement was necessary to be done in order to transfer the property and render the settlement binding upon him. He may of course do this by actually transferring the property to the persons for whom he intended to provide, and the provision will then be effectual, and it will be equally effectual if he transfer the property to a trustee for the purposes of the settlement, or declare that he himself holds it in trust for

<sup>1</sup> The court in *Ray v. Simmons*, 11 R. I. 266, citing *Exton v. Scott*, 6 Sim. 31; *Fletcher v. Fletcher*, 4 Hare, 67; *Carson's Adm'r v. Phelps*, 40 Md. 73; *Souverybye v. Arden*, 1 Johns. Ch. 240; *Bunn v. Winthrop*, 1 Id. 329.

<sup>2</sup> *Scott v. Berkshire Co. Sav. Bank*, 140 Mass. 157; *Eastman v. Woronoco Sav. Bank*, 136 Id. 208; *Gerrish v. New Bedford Institution*, 128 Id. 159; *Murray v. Cannon*, 41 Md. 466; *Gardner v. Merritt*, 32 Id. 78; *Martin v. Funk*, 75 N. Y. 134; *Barker v. Frye*, 75 Me. 29; *Pope v. Savings Bank*, 56 Vt. 284; *Ide v. Pierce*, 134 Mass. 260; *Sherman v. New Bedford Five-Cents Sav. Bank*, 138 Id. 581; *Hayden v. Hayden*, 142 Mass. 448.

<sup>3</sup> *Martin v. Funk*, 75 N. Y. 134; *Anderson v. Thompson*, 38 Hun, 394; *Mable v. Bailey*, 95 N. Y. 206.

<sup>4</sup> 4 De G. F. & J. 264.

those purposes, and if the property be personal the trust may, I apprehend, be declared either in writing or by parol."

(b) *Review of Martin v. Funk continued.* Funk, the administrator on the estate of the depositor, contended that the transaction did not transfer the property, that there was no sufficient declaration of trust, and that by retaining the pass-books the intestate never parted with the control of the property. The question involving substantially the same facts, remarked the Chief Justice, had been several times before different courts of the State, and in every instance the transaction had been sustained as a good gift. The decisions were then briefly reviewed. "The case of Witzel,<sup>1</sup> before Surrogate Bradford, and Millspaugh v. Putnam,<sup>2</sup> were deposits in the same form, and in the former the *cestui que trust* had no notice of the deposit, and in both cases the gift was held effectual. In Smith v. Lee,<sup>3</sup> money was deposited with the defendant, and a note taken payable to the depositor for another person, and it was held that the depositor constituted himself a trustee. The case of Kelly v. Manhattan Institution<sup>4</sup> was a special term decision of the New York Common Pleas, before Robinson, J., where precisely such a deposit was made as in this, and it was upheld as an absolute gift. These decisions, although not controlling upon this court, are entitled to respect, and they show the tendency of the judicial mind to give these transactions the effect which on their face they import."

(c) *Rhode Island case.* An instructive case occurred in Rhode Island.<sup>4</sup> B. deposited money in a savings bank in his own name as trustee for R. his stepdaughter. He gave the book to her, who, however, returned it to him. He was childless and treated her as his daughter. After his death his administrator claimed the deposit. But the court thought that the trust was completely constituted. "B. deposited the money in the bank to himself as trustee. The bank receiv-

<sup>1</sup> 3 Bradf. 386.

<sup>2</sup> 16 Abb. Pr. 380.

<sup>3</sup> 2 Th. & C. 591.

<sup>4</sup> Ray v. Simmons, 11 R. I. 266.

ing it credited it to him as trustee, and from time to time credited to him as trustee the dividends accruing thereon. It gave him a bank-book in which these credits were entered. B. moreover communicated to the plaintiff the fact that he had made the deposit to himself as her trustee by letting her have the book. It is urged that the book was returned to him by her and retained by him. But the book was given by the bank to him as trustee, and as trustee he would properly retain it. All was done which the plaintiff could ask, unless she desired to have the money paid or transferred to her, which would be not constituting the trust, but carrying into effect and discharging it. B. might have declared himself more explicitly, but, supposing his object was to create a trust and make himself the trustee, we can think of no act necessary to effect his purpose which he has left undone."

(d) *Maryland case.* In Maryland a good grandmother occasionally deposited money for five years to the credit of five grandchildren. The accounts were kept in the name of each as a minor, and the deposits were subject to her or her daughter. At the time of making the first deposits she said that "she was going to put the money in bank for the children." By the by-laws of the bank guardians could deposit for the benefit of their wards, and parents for their children; and if desired at the time of the deposit they could subject the same to the control of the guardian or parent. The grandmother died, and her daughter as executrix obtained from the bank all the money that had been deposited to the credit of the grandchildren. The court declared that the several gifts were perfected, and that the grandchildren were entitled to the same with interest from the time the executrix had withdrawn the money.<sup>1</sup>

(e) *Murray v. Cannon.* In another case an account was opened in a savings bank to the credit of "James Cannon, subject to his order, or to the order of Mary E. Cannon," his daughter; and from time to time money was thus deposited.

<sup>1</sup> *Gardner v. Merritt*, 32 Md. 78.

After the father's death the daughter claimed that he had given her the book of deposit with the money credited therein to be held by her in trust for herself and her brothers and sisters. "The only mode in which money could be changed from one person's account to another's in the bank was by a payment of the one account and a new deposit in another account." It was decided that the depositor did not part with his money while living, because it was subject to his order, or the order of his daughter; a delivery of the book was not a delivery of the money itself.<sup>1</sup>

(f) *New Hampshire case.* A father deposited for his wife \$300 in the name of her daughter. The deposit book was put in a trunk, the key to which was put in another trunk, that was not locked. When making the deposit he signed a certificate which stated among other things that "the deposit might be withdrawn by the person who may present the book entering the same and receipting therefor." Mr. Norton afterward took the deposit-book and pledged it to the bank as security for his notes held by the institution. The daughter did not know that he had pledged the book, nor did she know of the deposit while her father lived. Chief Justice Doe said: "It is to be inferred that the mother intended an absolute gift of the money deposited in the daughter's name; that there has been no attempt to revoke it; and that the daughter has accepted it. This is a gift."<sup>2</sup>

(g) *Connecticut case.* Two savings bank deposit-books were left by A. B. at his death in 1879, one of which stood in his own name and the other in the name of "J. B. order of A. B." J. B. was the son of A. B. On the last page of the first book was the following order: "May 12, 1878. Treasurer of B. Savings Bank: Pay J. B. what may be due on my deposit-book No. —, A. B." On the last page of the other was the following: "August 12, 1871. Treasurer of B. Savings Bank: At my decease pay J. B. what may be due on my deposit-book No. —, A. B." Other deposits were made and money

<sup>1</sup> *Murray v. Cannon*, 41 Md. 466.

<sup>2</sup> *Kimball v. Norton*, 59 N. H. 1.



was drawn on both books after the date of the orders. The books were kept by the treasurer of the savings bank, A. B. having excess to them whenever he pleased as long as he lived. J. B. never had possession of the books, nor any knowledge of them during the life of his father. These facts did not establish a gift.<sup>1</sup>

(h) *New Jersey case.* In 1874 a depositor in a savings bank, Rachel Speer, ordered the following entry to be made in her account: "Frank B. Smith, hatter, Danbury, Conn., son of Joseph Smith and Cornelia, to be drawn by Rachel; after death, by Frank." In 1870, she directed the following entry to be made in her pass-book in another savings bank: "This account is in trust for Frank B. Smith," to which she signed her name. She kept both pass-books in her possession, and drew the dividends and part of the deposits until 1878, when she became insane. The court declared that "her design in making the entries evidently was to make a disposition of a merely testamentary character." Hence there was no gift.<sup>2</sup>

(i) *Maine case.* In another case the entry was in the name of the depositor, but above it was written "Sub. to E. M. Robinson." The depositor kept the book, drew the dividends and used them and a small portion of the principal, and E. M. Robinson never knew that the deposit was made. This was not a gift. "A declaration of an intention to give is not a gift. The donor must be divested of, and the donee invested with the right of property. The indispensable essentials of a gift, delivery to the donee, and loss of dominion over it by the donor, are wanting."<sup>3</sup>

(j) *Massachusetts case.* A. deposited several sums of money in a savings bank "in trust" for some relatives, and informed them of what he had done, saying that he could control the money while he lived, but that it was theirs after his death.

<sup>1</sup> *Burton v. Bridgeport Sav. Bank*, 52 Conn. 398.

<sup>2</sup> *Smith v. Speer*, 34 N. J. Eq. 336.

<sup>3</sup> *Northrop v. Hale*, 73 Me. 66, citing *Geary v. Page*, 9 Bosw. 290.

He gave the deposit-book into the possession of one of them, but drew the interest himself. About a year before his death he said that he should not make a will, and that he had provided for his relations by depositing money in the savings bank. The night before he died he said to them: "When I am gone you take these books and transfer the money to your names, and say nothing to nobody about it." This was declared to be not a perfected gift, and A.'s administrator therefore was entitled to the money.<sup>1</sup>

(k) *Vermont case.* A. deposited her own money in a savings bank in the name of B., and took a deposit-book in which the treasurer had entered beside the date and number, "Adaline F. Brown deposited \$220." A corresponding entry was made in the bank-book. A. kept the book in her possession until her death, and B., who died before A., did not know of the gift during her life. Nevertheless, this was declared to be a perfected gift, and the money belonged to B.'s estate.<sup>2</sup>

§ 162. **Is the keeping of bank-book consistent with intention to give deposit.** As one of the rules of a savings bank requires the producing of the book by the claimant of the deposit, if the donor retains possession of it, "and never communicates to the person in whose name the deposit is made the fact that he has made the deposit, this is evidence upon the question whether, even if the depositor intended to make a gift he has fully executed his intention so as to make the gift complete; and any evidence that the deposit was made in this form for any other purpose than to transfer the title to the person to whom it is credited, so that he may draw it for his own use and benefit, would of course be competent evidence upon the question whether a gift was ever intended."<sup>3</sup>

<sup>1</sup> Nutt v. Morse, 142 Mass. 1.

<sup>2</sup> Howard v. Savings Bank, 40 Vt. 597.

<sup>3</sup> Field, J., Ide v. Pierce, 134 Mass. p. 262, citing Broderick v. Waltham Sav. Bank, 109 Id. 149; Clark v. Clark, 108 Id. 522; Brabrook v. Boston Five-Cents Sav. Bank, 104 Id. 228; Pierce v. Boston Five-Cents Sav. Bank, 129 Id. 425.

(a) *Opinion of Judge Clifford.* In some cases this rule has proved a strong barrier to the establishing of the gift. The courts have thought that, as the rule is well known, the depositor would have delivered the book if he intended to make a gift of his deposit. In a case tried before Judge Clifford of the United States Circuit Court, Jackson deposited money in trust for George Carpenter "in a savings bank, keeping the pass-book, and saying nothing to Carpenter about the transaction." Judge Clifford said: "Beyond all doubt the money deposited belonged to the depositor at the time it was deposited in the savings bank. It was deposited in the name of the depositor, in trust for George Carpenter, but the depositor retained the pass-book and never gave the person named as *cestui que trust* any notice of what he had done, nor did he have any knowledge of the deposit until after the death of the depositor. Money deposited, the by-laws provided, shall not be withdrawn except by the depositor, or by some person by him or her authorized by a written order signed by the depositor and witnessed, or otherwise legally authorized, and on producing the original book of deposit that such payment may be made thereon, and in all cases of withdrawal, one week's notice may be required. Cases arise where it is held that a person may constitute himself a trustee of a fund for another when the fund remains in his control; but the difficulty with the respondent (Carpenter) in this case is that the depositor kept the pass-book, and never notified the supposed *cestui que trust* that any such disposition of the deposit had been made in his favor.<sup>1</sup> Without more it is clear that the mere entry in the pass-book, in the form there exhibited, is not sufficient to show that the money deposited passed to the supposed *cestui que trust*. Authorities to support that proposition are full, to the point, and decisive."<sup>2</sup>

(b) *Massachusetts Supreme Court.* In another case the

<sup>1</sup> *Vanderberg v. Palmer*, 4 Kay & Johns. 204; *Armstrong v. Temperon*, 24 Law T., N. S. 275.

<sup>2</sup> *Stone v. Bishop*, 4 Clif. 593.

money was deposited by "Betsy Abbott, trustee of Ann Clark," but the depositor retained the pass-book and never told Ann Clark what she had done. "By one of the by-laws of the bank," said the court, "no one could draw any part of the money without producing the bank-book. Even if the plaintiff could prove that she intended to create a trust, she did not do what was necessary to carry the intent into effect. Ann Clark was not a party to the transaction, and never acquired any title to the money, and upon the death of Betsy Abbott it passed to her administrator."<sup>1</sup>

(c) *New Hampshire Supreme Court.* In New Hampshire this bank regulation is not regarded so serious an obstruction to the perfecting of a gift. In *Blasdel v. Locke*<sup>2</sup> the donor during her last sickness informed her niece, the donee, for the first time of the gift. In a suit by her administrator against the donee and the bank to recover the deposit the court decided that the deposit created a trust in the bank in favor of the donee, and that when information was conveyed to her by A. of the deposit and the same was accepted, her title to the money became absolute although there was no delivery of the deposit-book. This case differs from the others in one regard, the donor had conveyed notice to the donee of what she had done.

(d) *Summary of cases.* In these cases the bank rule requiring the producing of the book by the claimant played a more or less important part in determining them. In no case has it been held that the retaining of the book alone was conclusive of the depositor's intention not to make a gift. His failure to do so has not been a fatal bar to establishing the gift by other evidence. It has simply been a fact of varying weight with the courts of his intention.

§ 163. **Deposit in trust to evade the law limiting amount.** Again, in whatever States or places the amount which may be deposited by law is limited a legal inference is, from entering a deposit as trustee for another and saying nothing to

<sup>1</sup> *Clark v. Clark*, 108 Mass. 522.

<sup>2</sup> 52 N. H. 238.

the person thus mentioned, that the depositor's intention is to evade the law, and not to give away his deposit.<sup>1</sup> Said Judge Wells in the Brabrook case: "it would appear that it was the intention of Knowles [the depositor] to deposit the whole money as his own; and that the form of deposit was adopted for the sole purpose of evading a by-law of the bank and a provision of the statutes limiting the amount that could be received from any one depositor to one thousand dollars."

§ 164. **Evidence to show intention.** (a) *Scott v. Berkshire County Savings Bank.*<sup>2</sup> Last, what evidence can be introduced to show whether he is holding it as trustee or for himself. In the case just mentioned Judge Colt remarked that on the question of the donor's intention in holding the book before the gift was perfected—whether she held it as owner or as the agent or depositary for the plaintiff—her declarations and acts while holding it, showing the character of the act, were competent. In *Bartlett v. Remington*<sup>3</sup> the court remarked that "in cases of this kind the questions are whether the depositor intended to establish a trust and make himself a trustee, what is competent evidence of his intention and what inference of fact is to be drawn from the evidence." In the case in question R. deposited money in her own name "in trust for Sarah." The by-laws provided that no money should be paid without producing the pass-book, and that any depositor might designate at the time of making the deposit the person for whose benefit it was made, and that the depositor and his legal representatives should be bound by such condition. It was found that the depositor did not intend to part with the title or power of disposing of the property so long as she lived, but simply that whatever might be left at her death should go to Sarah. The court remarked that "the depositor did not constitute herself a trustee. The nominal trust was a testamentary disposition

<sup>1</sup> *Brabrook v. Boston Five-Cents Sav. Bank*, 104 Mass. 228; *Scott v. Berkshire Co. Sav. Bank*, 140 Id. 157. See § 173.

<sup>2</sup> *Supra.*

<sup>3</sup> 59 N. H. 364.

of property," and as it was not made as the law required the fund belonged to her estate.

(b) *Gerrish v. New Bedford Institution and other cases.* In another case R. deposited a sum of money to the credit of her nephew N., keeping the deposit-book herself and having noted thereon that the money could be paid to her. After her death the question was whether the deposit belonged to her nephew N. or to her administrator. Could evidence be introduced "to vary the effect of the entries"? "We think," said the court "the evidence is admissible." Such evidence was admitted in four cases of a quite similar nature.<sup>1</sup> In the last of these "a father made three deposits as trustee, one in trust for his only son, and the others in trust for two grandchildren, taking separate deposit-books and keeping them in his own possession. In all of these cases the gifts were sustained; but, to enable the court to do so, resort was had to extraneous evidence to ascertain the intent of the donors. And in the case last cited the competency of such evidence was one of the questions submitted to the court, and the court held it was admissible."<sup>2</sup>

§ 165. **Absence of parol evidence to explain intention.** But what shall be done when the depositor's intention is not clear, and no parol evidence can be produced to show what he intended to do? It is certain that the declaration of the depositor contained in his pass-book "in trust" in many, probably most, of the cases, is designed to evade the by-law regulating the amount of his deposit. But would not the public good be better served by regarding such a declaration as evidence of intent to make a gift in the absence of clear evidence to the contrary?

§ 166. **Enforcement of trust.** (a) *Must be complete.* "When the trust is voluntary, courts of equity do not enforce it so long as it remains inchoate or incomplete; but when once the

<sup>1</sup> *Minor v. Rogers*, 40 Conn. 512; *Ray v. Simmons*, 11 R. I. 266; *Hill v. Stevenson*, 63 Me. 364; *Gerrish v. New Bedford Institution*, 128 Mass. 159.

<sup>2</sup> Judge Walton's review of the *Gerrish* case in *Northrop v. Hale*, 72 Maine, p. 277.

trust has been constituted, they do not refuse relief because it is voluntary.<sup>1</sup> A person need use no particular form of words to create a trust, or to make himself a trustee. It is enough if, having the property, he conveys it to another in trust, or, the property being personal, if he unequivocally declare either orally, or in writing, that he holds it *in præsentia* in trust, or as a trustee for another.<sup>2</sup>

(b) *Usual mode of creating trust is insufficient.* In New Hampshire, though, it is maintained that an executory trust without consideration cannot be enforced, that the trust must be executed, and that the equitable title and beneficial interest be vested in the donee,<sup>3</sup> and further, that a deposit in a savings bank in trust for another, who is neither party nor privy to the transaction, is an executory trust, if the depositor retains the title and power of disposing of the property.<sup>4</sup>

§ 167. **A deposit may be a valid donatio causa mortis gift.** Finally, there remains for consideration the other kind of deposit gift. "It has been repeatedly held," says Judge Endicott, "that a deposit in a savings bank may be the subject of a valid *donatio causa mortis*, as well as of a gift *inter vivos*, and that such a gift may be proved by the delivery of the bank-book to the donee, or to a third person for the donee, accompanied by an assignment."<sup>5</sup>

<sup>1</sup> *Stone v. King*, 7 R. I. 358.

<sup>2</sup> The court in *Ray v. Simmons*, 11 R. I. 266, citing *Ex parte Pye*, 18 Ves., Jr., 140; *Milroy v. Lord*, 4 De G. F. & J. 264; *Richardson v. Richardson*, L. R., 3 Eq. 686; *Kekewich v. Manning*, 1 De G. M. & G. 176; *Morgan v. Malleson*, L. R., 10 Eq. 475; *Penfold v. Mould*, L. R., 4 Eq. 562; *Wheatley v. Purr*, 1 Keen, 551 and note; *McFadden v. Jenkyns*, 1 Hare, 458; affirmed on appeal, 1 Phillip, 153; *Thorpe v. Owen*, 5 Beav. 224.

<sup>3</sup> *Bartlett v. Remington*, 59 N. H. 364; *Stone v. Hackett*, 12 Gray, 227.

<sup>4</sup> *Bartlett v. Remington*, 59 N. H. 364, following *Gardner v. Merritt*, 32 Md. 78; *Kilpin v. Kilpin*, 1 My. & K. 520; *Minor v. Rogers*, 40 Conn. 512; *Brabrook v. Boston Five-Cents Sav. Bank*, 104 Mass. 228; *Blasdel v. Locke*, 52 N. H. 238.

<sup>5</sup> *Pierce v. Boston Five-Cents Sav. Bank*, 129 Mass. 425, p. 430, citing *Kingman v. Perkins*, 105 Id. 111; *Foss v. Lowell Five-Cents Sav. Bank*, 111 Id. 285; *Kimball v. Leland*, 110 Id. 325; *Sheedy v. Roach*, 124 Id. 472; *Davis v. Ney*, 125 Id. 590. The delivery of a savings bank pass-book

§ 168. **Delivery of book essential.** "As there can be no manual delivery of the credit which the donor has in the bank, the delivery of the book, which represents the deposit, and is the only evidence in the possession of the donor of his contract with the bank, together with an order or assignment, operates as a complete transfer of the existing fund, and is all the delivery of which the subject is capable."<sup>1</sup> And even the delivery of the book without a written assignment will suffice.<sup>2</sup>

§ 169. **No explanation for non-delivery permissible.** But there must be a delivery of the book says the Supreme Court of Vermont.<sup>3</sup> And if it be beyond the reach of the would-be donor so that no delivery can be made this furnishes no excuse and the gift fails.<sup>4</sup>

(a) *Curtis v. Portland Savings Bank.*<sup>5</sup> A lady made a deposit in a bank and by her direction the receiving official wrote in the pass-book that was given to her: "Sub. also to Catharine E. Curtis." Afterward, Catharine, by direction of the depositor, who was her aunt, unlocked the trunk containing the book and took it therefrom, her aunt saying: "Now keep this, and if anything happens to me, bury me decently and put a headstone over me, and anything that is left is yours." "This, in our opinion," said the court, "constituted a gift *causa mortis*. The former entry of 'subject also to Catharine E. Curtis' showed that she then had in contemplation a gift to the plaintiff, but it was not completed by delivery. But only four days before her death the declaration above quoted, accompanied by the manual delivery of the deposit-book, rendered unmistakable her intention. The delivery

containing the entries of the moneys deposited by a deceased wife with a parol gift of the same by the surviving husband when *in extremis* is a valid *donatio causa mortis*, *Tillinghast v. Wheaton*, 8 R. I. 536.

<sup>1</sup> *Pierce v. Boston Five-Cents Sav. Bank*, 129 Mass. 425.

<sup>2</sup> *Id.*, the court citing many authorities.

<sup>3</sup> *French v. Raymond*, 39 Vt. 623.

<sup>4</sup> *Case v. Dennison*, 9 R. I. 88.

<sup>5</sup> 77 Me. 151.



was sufficient.<sup>1</sup> Nor did the special qualification annexed to the gift defeat it. This was only coupling the gift with the trust that the donee should provide for the funeral of the donor. *Hills v. Hills*<sup>2</sup> is precisely in point, and has been approved by the court in *Clough v. Clough*.<sup>3</sup>

(b) *Delivery to third person.* The delivery may be made to a third person for the donee ; such a delivery would be as effective as to the donee himself. But delivery to another as agent for performing the further act of delivering the thing after the donor's death would not be effective.<sup>4</sup>

§ 170. **Gift to survivor of two depositors.** An agreement of two savings bank depositors that the survivor should have the other's deposit, each retaining the absolute title and control of his deposit during life, is a testamentary disposition of property and invalid because it is not made in the way required by statute.<sup>5</sup>

<sup>1</sup> *Hill v. Stevenson*, 63 Me. 364 ; *Pierce v. Boston Five-Cents Sav. Bank*, 129 Mass. 425 ; *Tillinghast v. Wheaton*, 8 R. I. 536.

<sup>2</sup> 8 Mees. & Wels. 401.

<sup>3</sup> 117 Mass. 83. See also *Davis v. Ney*, 125 Id. 590.

<sup>4</sup> *Newton v. Snyder*, 44 Ark. 42. In this case it was held that to establish a *donatio causa mortis* gift the evidence must show not only that the person *in extremis* designated with proper distinctness the thing given and the donee, but also that the property was to pass presently, and that the intention was effected by actual delivery. See also *Lamson v. Monroe*, Me. Sup. Ct., 6 Eastern Rep. 160 ; *Parcher v. Saco & Biddeford Sav. Bank*, Me. Sup. Ct., 8 Id. 637.

<sup>5</sup> *Towle v. Wood*, 60 N. H. 434.

## CHAPTER IV.

## PAYMENTS BY SPECIAL AGREEMENT—SAVINGS BANK DEPOSITS.

§ 171. **Deposit must be applied as depositor intended.** (a) *Bank of the United States v. Macalester.*<sup>1</sup> Whenever money is deposited for a special purpose it must be applied in accordance with the depositor's direction.<sup>2</sup> Plain as this rule is, on many occasions it has been ignorantly or knowingly violated. The State of Illinois created two separate funds for internal improvements; one was under the control of canal commissioners, and the other of a fund commissioner. Each party opened an account with the United States Bank. The bank agreed to pay coupons and bonds issued by the canal commissioners, and they left money with the bank for that purpose. The fund commissioner having overdrawn his account with the bank, it sought to apply the deposit of the canal commissioners towards the payment of the deficit, instead of the bonds and coupons as promised. This, the court held, the bank could not do. Said the court: "As long as the deposit is permitted to remain in their hands, they are the agents of the holders of the coupons to the amount of the fund set apart for their payment. It would be a culpable breach of trust to appropriate the fund to any other purpose, and especially to apply it to their own use."<sup>3</sup>

(b) *Review of English cases.* "Thus, in *Taylor v. Plumer*,<sup>4</sup> Lord Ellenborough held that the interests of the *cestui que trust* [or the person for whose benefit a trust is created] shall

<sup>1</sup> 9 Pa. 475.

<sup>2</sup> *Judy v. Farmers and Traders' Bank*, 81 Mo. 404.

<sup>3</sup> Lord Tenterden, C. J., in *Stewart v. Lee*, 1 Moo. & Mal. p. 161, said: "Any person who knowingly assists another in applying money to a different purpose from that to which he was bound to apply it cannot treat that as a proper application of the money."

<sup>4</sup> 3 Mau. & Sel. 562.

not suffer by a change in the form of the fund, whether it was made in the performance of the trustee's duty, or violation of it; because an abuse of the trust can neither give nor take away a right. In *Davis v. Bowsher*,<sup>1</sup> it is ruled that bankers have a lien on securities in their hands, for a general balance of account; but Lord Kenyon takes care to except such securities as were delivered to him under a particular agreement. In *Cox v. Prentice*,<sup>2</sup> the principle is asserted by Lord Ellenborough as clear and unquestionable, that an agent who received money from his principal, is liable, as long as he stands in his original situation, and until there has been a change of circumstances by his having paid the money to his principal, or done something equivalent to it. Although the principles contained in the cases have a strong bearing on the question, yet I agree they are not so directly in point as *Jarvis v. Rogers*,<sup>3</sup> in which the doctrine is asserted that an agreement to hold a security for a specific purpose, deprives the holder of the right to apply it to a different one. Mr. Justice Wilde says: If a debtor obtains of his creditors a loan of money on pledge, on the express agreement that the pledge shall be returned on repayment of the loan, the creditor cannot retain the pledge as a security for a prior debt without violating the principle of good faith. Parties having a legal capacity to contract have a right to make such stipulations as they see fit, provided they do not contravene the law; and such stipulations are to be faithfully observed by the contracting parties. So in *Parkist v. Alexander*,<sup>4</sup> it is ruled that an agent cannot avail himself of the advantage given by his agency to apply it to his own benefit to the injury of others. So in the *Turnpike v. Watson*,<sup>5</sup> it is held that the agent of a corporation who has received money for its use cannot in an action for money had and received brought against him by the corporation, prove by way of set-off that

<sup>1</sup> 5 Term, 488.

<sup>3</sup> 15 Mass. 389, p. 397.

<sup>5</sup> 1 Raw. 330.

<sup>2</sup> 3 Mau. & Sel. 344.

<sup>4</sup> 1 Johns. Ch. 394.

he has paid the debts of the corporation without showing a special authority. The principle clearly asserted is that an agent cannot pay off any debt with a fund intrusted to him for another purpose. The legitimate inference to be drawn from the cases cited is that the bank having received the money from the State for the special purpose of paying the principal and interest of the debt contracted, or money loaned for constructing the Illinois and Michigan Canal cannot divert it from its legitimate object to the prejudice of the holders of the coupons issued on the credit of the fund by applying it to a general balance against the State. From this it follows, that by a refusal to pay, on the pretext of a set-off a wrong was done to the defendant, for which an action lies to recover the value of the coupons.”<sup>1</sup>

(c) *Special deposits in a savings bank.* An instructive case occurred in New Jersey. A savings bank was authorized to receive and invest deposits, and to divide the income among the depositors. The principal was to be repaid with interest under such regulations as the board of managers should prescribe. Two kinds of deposits were received under the regulations established. One kind participated in the profits, but were not payable until after thirty days' notice; and the other kind, which were called special deposits, were not to participate in the profits, but were to be repaid on demand. Both kinds, however, were intermingled by the bank. Nevertheless, the so-called special deposits were not entitled to priority in payment over the others. The court said that these deposits “were delivered to the bank in the same manner as the other deposits, and the obligation of the bank in regard to them was answered by the return to the owner of an equal amount of money on demand.”<sup>2</sup>

(d) *Case of a single special deposit in a savings bank.* In a controversy with the Newark Savings Institution over a \$25,000 deposit, which was made on the condition that the

<sup>1</sup> Rogers, J., 9 Pa. 475, p. 482.

<sup>2</sup> Stockton v. Mechanics and Laborers' Sav. Bank, 32 N. J. Eq. 163.

bank would pay \$1460 annually to a widow during her life, and the surplus of the income, if there should be any, to her children, the question was whether the deposit was special. The bank was authorized by charter to accept and execute trusts created by will or by order of any court, and therefore had authority to receive the deposit mentioned on the condition stated. The court decided that it was not taken as a special trust nor differed materially from the ordinary deposits of the bank.<sup>1</sup>

(e) *Retention of fiduciary deposit to discharge agent's debt.* In another interesting case an action was brought by Baker & Wilson against a bank to recover the amount of a check drawn thereon by "C. A. Wilson & Bro., agents." The bank account against which the check was drawn represented trust moneys belonging to Baker & Wilson, for whom Wilson & Brother were agents. The deposits to the credit of this account were made in the name of the firm with the word "agents" added. They were the proceeds of commission sales. Wilson & Brother became insolvent in October, 1878, and they opened the account in this form for the purpose of protecting their principals, which was known by the bank at the time. The check in question was drawn in settlement for a balance due to Baker & Wilson on cash sales made by the drawers as their agents. "It is clear," said Judge Andrews, who delivered the opinion of the court, "upon the facts that the fund represented by the deposit account was a trust fund, and that the bank had no right to charge against it the individual debt of Wilson & Brother. The bank having notice of the character of the fund could not appropriate it to the debt of Wilson & Brother, even with their consent, to the prejudice of Baker & Wilson."<sup>2</sup>

(f) *Misapplication by bank of a deposit of certified check.* Dixon, of New York City, delivered to Strauss his accommodation check, which was drawn on the Tradesmen's National Bank.

<sup>1</sup> Vail v. Newark Sav. Institution, 32 N. J. Eq. 627.

<sup>2</sup> Baker v. New York Nat. Ex. Bank, 16 Abb. N. Cas. 458.

Afterward Dixon informed Strauss that he had not the funds to meet his check. Accordingly, Strauss made his own check on another bank, by which it was certified, and delivered it to the Tradesmen's National Bank to pay the borrowed check of Dixon. The bank, however, did not apply the check as Strauss directed, but applied it so far as necessary to pay Dixon's indebtedness to the bank. Judge Daniels said that the fact clearly appeared that Strauss's check was deposited with the Tradesmen's National Bank to the credit of Dixon "solely for the purpose of paying the check received from him. . . And the bank having so received it, understanding that to be the intent and object of its deposit, legally accepted the trust created by the transaction, and became obligated to appropriate so much of the plaintiff's check as should be required for that purpose to the payment of the check loaned to them by Dixon. It was not necessary for the creation of this obligation that the officers of the bank should expressly agree so to use and apply Strauss's check. The obligation to do that very clearly arose out of the delivery of the check to the bank with notice that such was the object of its delivery, without any concurrent promise on the part of the officers of the bank to carry that object into effect. Their conduct was such as to disclose their acquiescence in the purpose for which the check was delivered and received, and out of that the obligation plainly arose to apply its proceeds solely and specially as the plaintiffs intended they should be applied. A trust to this extent was created in the plaintiff's favor, and the bank had no right or authority to use any part of the proceeds of the check for a different object."<sup>1</sup>

(g) *Misapplication by a Pennsylvania bank.* A very plain misapplication of a special deposit was made by a bank in Pennsylvania. A. made two contracts for the delivery of oil at his own option within a stated time. He gave the cashier of a bank counterparts and also the check of H., a depositor, for \$6250 as a security or margin in the event of not fulfilling

<sup>1</sup> Strauss v. Tradesmen's National Bank, 36 Hun, 451.

them. A. indorsed the counterparts to the effect that the margin was the guarantee for the fulfilling of the contracts, and if more margin was needed, demand should be made on him, and if the contracts were not met they should be sold. The cashier indorsed on the counterparts the receipt for the margin on the conditions mentioned. Before the maturity of the contracts they were settled at a small loss to A., and the balance of the checks given by H. were credited to A. who drew out the money. H. sued the bank to recover the balance of his check which was not used in liquidating the loss on the contracts, and the court held that he ought to have it. The court said that "doubtless to the extent of the amount required to settle the contracts and pay the losses incurred by A. the bank had a right to use the funds placed at its disposal by H. for that purpose. . . In other words, the checks operated as a specific appropriation to the extent named therein, of the drawer's funds to be applied by the bank solely to the payment of such sum or sums as A. might become liable to pay in the event of his failure to comply with the terms of the contracts, and the bank as custodian of the money for that specific purpose had no right to appropriate it in any other way."<sup>1</sup>

(h) *Johnston v. Parker Savings Bank.*<sup>2</sup> In another case an oil dealer left at his bank a check for \$1500 drawn in his favor by B., another depositor. The latter had no funds in the bank at that time, yet the check was left, so the dealer claimed, under an agreement with the cashier that it should be paid from the first deposit of B. that was unappropriated. Subsequently, he deposited large sums, but no appropriation of them was made to pay the check in question. The holder then brought a suit against the bank for not executing the agreement, but failed because he did not prove it. Beside his own evidence the depositor offered to show that such a

<sup>1</sup> *Parker v. Hartley*, 91 Pa. 465. The case of *Jamison v. Collins*, 11 Phila. 258, is another application of the rule concerning the application of special deposits. The facts are too numerous to be given.

<sup>2</sup> 101 Pa. 597.

transaction often happened between the bank and its depositors, but the evidence was excluded for the reason that it was neither an offer to prove a special custom, nor a special course of dealing between the bank and the plaintiff.

§ 172. **Bank not bound by unknown agreement among joint depositors.** (a) *Viets v. Union National Bank*.<sup>1</sup> A bank is not bound in any way by the agreement of depositors concerning the use or payment of a deposit of which it has no notice. Whatever rights such parties may have against the depositor, the bank is protected in paying to the one who apparently has the right to receive it. Thus A., at the request of B., deposited money belonging to the latter with the National Union Bank of Troy. He made the deposit, however, in his own name to the credit of a deposit account he had with the bank, but gave B. two checks for the amount which the latter indorsed and delivered to L. as part consideration for her promise to marry him. Lunacy proceedings were subsequently instituted against him, and while they were pending, the bank was enjoined from paying the deposit to any one. Having been adjudged a lunatic an order was made directing the bank to pay the deposit to a committee, with which order it complied. One of the checks was presented during the pending of the lunacy proceedings, and the other afterward. In an action by A. to recover the deposit it was held that as the money belonged to B. when deposited, although it was in A.'s name, it remained the property of B., and the payment to the committee was therefore legal. The court remarked that even if it be assumed that there was an equitable right in E., the person whom B. married, "to the money arising out of the ante-nuptial contract with her husband, such equity cannot be invoked as against the bank that had no notice of the same and in good faith paid the money to the legal representative of the owner thereof. The bank is entitled to protection for the reason that it paid the money to one who apparently had the right to receive it. If any

<sup>1</sup> 101 N. Y. 563.



equitable claim existed in favor of any third party, it could only be prosecuted and enforced in an action against the committee, who had received the money and not against the bank in contravention and repudiation of its right to pay which it had exercised in good faith to one ostensibly vested with lawful authority to receive the same. With this apparent lawful authority presented by the committee to the bank, it was not required to examine and determine the equities of other parties, of which it had no knowledge, to the fund, and it had right to assume that the committee appointed by the court had full power to act. It must be conceded that if the adjudication of lunacy was in force at the time the payment was made, it was a valid and legal payment and an effectual bar to any claim by the plaintiff or any other person to recover the money of the defendant."

(b) *Riley v. Albany Savings Bank*.<sup>1</sup> In another case, F. in the presence of two others, made a deposit for R. and in her name, and which was not to be withdrawn unless the three were present. The money was afterward paid to F. during R.'s life on the producing of her check and pass-book. Subsequently, her administrator sued the bank to recover the amount, on the ground that it was culpably negligent in paying the deposit, as the three persons were not present when this was done. This understanding or agreement between F. and his companions was never known by the bank, and if the bank clerk, with whom it was claimed the arrangement was made, had known of it, his authority was restricted to the receiving of money on the terms and conditions printed in the pass-book; only the president could make such an agreement. The court therefore decided on this part of the case that the money belonged to R., that "it was deposited in the bank without her knowledge or consent," that "she was therefore not a party to any agreement as to the manner of drawing it out." Consequently, "she had a right to draw out

<sup>1</sup> 36 Hun, 513.

the money, and the bank had a right to pay it as the bank and R. might choose."

(c) *Payment to insane person.* The next question in the case was whether R. did draw out the money. She was insane at the time of giving the check, which was procured by F., by the overseer's advice of the poor of Albany, who refused to assist her after learning that she had money in the bank. The bank, however, did not know that she was insane, and paid the check in good faith, and therefore it was held that the payment could not be set aside on the application of her administrator.

§ 173. **Deposit in trust in form but not in fact.** (a) *Weber v. Weber.*<sup>1</sup> If a deposit be in trust in form, but really for the depositor, how should a bank regard it? Webber deposited money in a savings bank, "in trust for" his son. He made the deposit in this form for the purpose of obtaining the highest rate of interest which the bank allowed, and did not intend to part with the ownership or right of receiving back the money from the bank, nor to make a gift or transfer of the same, and further he agreed with the bank not to withdraw the money without producing the book which he kept himself. It was held that the circumstances under which the deposit was made were admissible to vary or explain its apparent character as a trust, that there was no intent on the part of Webber to create a trust in the money, and that he had not done so. Chief Justice Daly remarked that "it was left an open question in the case of *Martin v. Funk*,<sup>2</sup> whether surrounding circumstances may not be shown to vary or explain the apparent character of such a deposit, and the intent with which it was made. I entertain no doubt in my mind that this can be done in any case of such a deposit; and, in my opinion the circumstances of this case clearly established that there was no intent upon the part of the defendant to create any trust in this fund for the plaintiff and that he created none." The higher court of New York entertain the

<sup>1</sup> 9 Daly, 211.

<sup>2</sup> 75 N. Y. 134.

same opinion. Says Judge Andrews: "If it was now necessary to decide that point, I should incline to the opinion that the character of such a transaction, as creating a trust, is not conclusively established by the mere fact of the deposit, so as to preclude evidence of contemporaneous facts and circumstances constituting *res gestæ*, to show that the real motive of the depositor was not to create a trust, but to accomplish some independent and different purpose inconsistent with an intention to divest himself of the beneficial ownership of the fund."<sup>1</sup>

(b) *Michigan case.* A case quite similar occurred in Michigan. Davis desired to open an account with the defendant bank. As he had one account there, and could not by usage have a second, it was suggested that he might deposit his money on an account in his wife's name, subject to his own draft. The account was opened in this manner and existed for ten years when his wife died. The bank then refused to recognize his right to the deposit. "If it was proper," said Judge Campbell, speaking for the court, "for plaintiff to show title in himself to the money in question, we can see no reason why he could not show all of the circumstances connected with the origin and history of the deposit, and his wife's statements in derogation of her interest. . . The contract of a depositor with his banker does not differ in any material way from any other contract whereby one person becomes bound to take charge of and repay another's funds. As between banker and depositor there can be no doubt that the bank will be protected in paying out money in such way and on such terms as the depositor has authorized. And, on the other hand, where the contract is not in writing it is equally clear that its real character and terms may be made out by testimony, and that the contracting party can lawfully control his own funds until he has disposed of them, and that it can make no difference in what name the account is kept, if it is understood to be his account, and has not been put beyond

<sup>1</sup> *Mabie v. Bailey*, 95 N. Y. 206, p. 210.

his control by some act which he cannot revoke. In the present case the testimony does not tend to show that the bank ever contracted with anybody but plaintiff, or received funds on this account which were not his funds. The case he made out, and which the jury must have found true, was that while deposited in the wife's name, it was not intended to be for her benefit, or to be beyond the husband's right to withdraw. . . The bank-book is no contract, and is only one of the means of indicating the state of the funds. Whatever presumptions may arise from it and whatever protection may be given to acts innocently done on that presumption, it cannot exclude explanatory evidence. The contract was made with plaintiff, and with no one else, and the bank is answerable to him to fulfil that contract."<sup>1</sup>

§ 174. **Action against assorting bank for deficiency.** If a bank deposit foreign money with another by agreement that it shall be sent to a third to be assorted at the risk of the depositor the first one cannot maintain an action against the assorting bank to recover a deficiency. It may be added that in the case in which this question arose the assorting bank received the money from the second bank by agreement that the latter should make good to the former all deficiencies which might be found in counting it.<sup>2</sup>

§ 175. **Rights of surety.** The rights of a surety on a note do not prevent the principal from making a special agreement with the depository concerning the application of deposits which are not charged with any trust or lien. Thus, after the maturity of a note at a bank where it was payable, the principal made an agreement with the corporation whereby he was to give persons who sold cattle to him checks payable at the bank after he should sell them and receive and deposit the money therefor. This was to be applied in paying his checks. In executing this agreement more than enough money was deposited and checked out to pay the note mentioned, if it

<sup>1</sup> Davis v. Lenawee Co. Savings Bank, 53 Mich. 163.

<sup>2</sup> Taylor v. Bank, 3 Allen, 189.

had been applied in that manner. The surety claimed that it ought to have been thus applied, but the court declared that the bank did right in paying the depositor's checks in accordance with the agreement.<sup>1</sup>

§ 176. **An agreement to pay check contrary to statute.** If a bank, having no funds of the drawer at the time his check is presented, verbally agrees to pay it provided the holder will deposit it in another bank so that presentation for payment can be made through the clearing house, the agreement is within the Statute of Frauds and cannot be enforced.<sup>2</sup>

§ 177. **Savings bank regulations.** The savings banks have regulations for the withdrawal of deposits, and which are usually printed in the books given to depositors. These rules are, "when properly made known to the depositor, a part of the contract between him and the institution."<sup>3</sup> Says Judge Learned: "They are made for the protection of the depositors and of the bank. They protect depositors against forged orders and orders obtained by fraud."<sup>4</sup>

(a) *When waived.* But if a bank violate its duties to a depositor it cannot shield itself behind these regulations. Thus, one of the rules that have been quite generally adopted requires the depositor to give a notice of several days or longer period of his intention to withdraw his deposit. But when a person applied for his deposit and was told that he had none the bank waived its right to the notice, for by denying that the plaintiff was a depositor in the bank, it repudiated the relation on which its right to the notice was founded.<sup>5</sup>

§ 178. **Production of book a reasonable regulation.** One of these rules requires the production of the book before the depositor can receive payment. The question was long ago asked, is such a regulation reasonable, and can it be enforced,

<sup>1</sup> *Wilson v. Dawson*, 52 Ind. 513.

<sup>2</sup> *Morse v. Massachusetts Nat. Bank*, 1 Holm. 209.

<sup>3</sup> *Israel v. Bowery Sav. Bank*, 9 Daly, 507.

<sup>4</sup> *Mitchell v. Home Sav. Bank*, 38 Hun, p. 257.

<sup>5</sup> *Townsend v. Webster Five-Cents Sav. Bank*, 8 Eastern Rep. 869; see *Lowe v. Harwood*, 139 Mass. 133.

to which the court gave an affirmative answer. If, however, the book is lost and cannot be found after proper search, the depositor is excused from complying with the regulation and may draw his money. "We see nothing unreasonable in this regulation," said Judge Davies,<sup>1</sup> "and we fail to come to the conclusion that it was intended or does in fact work any forfeiture of the depositor's money. It is to receive a reasonable construction, and not to be perverted to consummate fraud or work injustice. If the depositor, when he wishes to withdraw his money, cannot do what the regulations of the defendants require and what he has agreed and stipulated to do, he must certainly do the next best thing—account for the non-production, and show its loss or destruction. There would be no safety either to the bank or to the depositor if the former was bound to pay on demand, without the production of the pass-book as the evidence of authority to receive the money by the person demanding it; or, if it is not produced, the same security to both requires some excuse for its non-production to be given." The rule was applied to a German whose knowledge of English was meagre, and who had notice of the regulations only from his pass-book and from the first page of the signature-book which he had signed, and also from a copy of them posted in the banking room.

§ 179. **May pay without producing book.** But if a bank on the receipt of a deposit enters it and delivers a pass-book to the depositor containing the regulations for receiving and paying deposits, and among which, that no depositor shall be paid without producing the book and that all payments made to the person producing the same shall be deemed valid, the bank is authorized to pay the presentor without an order from the depositor, and if not negligent, the payment is binding on him.<sup>2</sup> Consequently, when a pass-book containing these conditions was presented by a person who was wrongfully in possession of it with a forged order purporting to have been

<sup>1</sup> *Warhus v. Bowery Sav. Bank*, 21 N. Y. p. 546.

<sup>2</sup> *Hayden v. Brooklyn Sav. Bank*, 15 Abb. Pr. N. S. 297.

signed by the depositor, and the amount was paid to him through no want of proper care and diligence on the part of the bank, the payment was declared to be valid.<sup>1</sup> But "if the signature of the receiving person should present a marked and noticeable dissimilarity to that of the depositor upon the bank's book, the failure to discover it would evidence negligence to be passed upon by a jury."<sup>2</sup>

§ 180. **Degree of diligence required in paying.** (a) *Remarks of Church, C. J.* What degree of diligence shall be exercised? "The officers of these institutions," said Chief Justice Church, "are held to the exercise of reasonable care and diligence."<sup>3</sup> If, by a regulation designed to prevent fraud upon depositors which by the rules the bank promised to endeavor to do, a fact or circumstance is brought to the knowledge of the officers which is calculated to and ought to excite the suspicion and inquiry of an ordinarily careful person, it is clearly the duty of the officers to institute such inquiry, and a failure to do so is negligence for which the bank would be liable."<sup>4</sup>

(b) *A New York case.* This question whether proper care had been shown by the officers in paying a deposit arose in a case against the Erie County Savings Bank.<sup>5</sup> The usual rule existed concerning the payment of deposits to persons producing the books containing the entry of them, but another rule stated that the bank would endeavor to prevent fraud on its depositors. The bank required each depositor to sign his name in a book kept for that purpose when opening an account with him. A depositor's book was stolen and presented, and the person who received the money signed the depositor's name to the receipt for the amount. The depositor in an action to recover the amount, introduced evidence to

<sup>1</sup> Schoenwald v. Metropolitan Sav. Bank, 57 N. Y. 418.

<sup>2</sup> Israel v. Bowery Sav. Bank, 9 Daly, 507. See § 97.

<sup>3</sup> Appleby v. Erie County Sav. Bank, 62 N. Y. p. 18, citing Heath v. Portsmouth Sav. Bank, 46 N. H. 78; Eaves v. People's Sav. Bank, 27 Conn. 229; Sullivan v. Lewiston Institution, 56 Me. 507.

<sup>4</sup> Id. See § 179.

<sup>5</sup> Appleby v. Erie County Sav. Bank, 62 N. Y. 12.

show that the signatures were unlike and requested the court to go to the jury on the question whether the failure to discover the discrepancy was not negligence, which was refused. "If the two signatures," said Chief Justice Church in reviewing the case, "were so dissimilar as when compared the discrepancy would be easily and readily discovered by a person competent for the position, then the failure to discover it would be evidence of negligence which should have been passed upon by the jury. It would not be evidence of negligence if the difference was not marked and apparent, or if it would require a critical examination to detect it, and, especially, if the discrepancy was one as to which competent persons might honestly differ in opinion."

(c) *Opinion of Doe, C. J.* Chief Justice Doe has thus explained the regulation. "The stipulation that a deposit may be withdrawn by any one presenting the book does not relieve the bank from the duty of acting in good faith and with reasonable care. As it does not mean that the bank may pay the money fraudulently to a person producing the book, but known not to be entitled to the money, so it does not mean that the bank is absolved from all obligation of caution. A depositor is a beneficiary of a fund held by the bank as trustee. The trustee is incorporated for the purpose of exercising care in the management and preservation of deposits. This object would not be accomplished by care in the investment of the fund, and recklessness in paying a deposit to a wrongful possessor of a book."<sup>1</sup>

(d) *When it agrees to use "its best efforts."* If the presentor of the book be of a different sex from the depositor this fact should excite suspicion and inquiry.<sup>2</sup> And if the by-law printed in the depositor's book states that "the bank will use its best efforts to prevent fraud; but that payments made to the presentor of it shall be valid, the bank is not fully protected in paying simply on the production of the book. The

<sup>1</sup> Kimball v. Norton, 59 N. H. 1.

<sup>2</sup> Allen v. Williamsburgh Sav. Bank, 69 N. Y. 314.



bank must use its "best efforts" to prevent fraud, and is not excused from making a wrong payment by showing that it paid the money in good faith and while exercising ordinary care and diligence.<sup>1</sup>

§ 181. **Rule of diligence in Massachusetts.** (a) *By-laws there on the subject.* In Massachusetts the same rule of diligence has been declared applicable in cases where the following by-laws are printed in the books of depositors: "As the officers of the institution may be unable to identify every depositor, the corporation will not be responsible for loss sustained, when a depositor has not given notice of his book being stolen or lost, if such book be paid in whole or in part on presentment. In all cases a payment upon presentment of a deposit-book shall be a discharge to the corporation for the amount so paid." Therefore, a depositor who had subscribed to these by-laws could not maintain an action to recover the amount of a forged order which the bank had paid to another on presenting the depositor's book, while exercising good faith and reasonable care in so doing.<sup>2</sup>

(b) *Donlon v. Provident Institution.*<sup>3</sup> Another case has occurred in that State over a deposit which was entered in a book containing the same by-law. After the death of a depositor, which was unknown to the bank, the deposit was paid to another who presented the book and fraudulently personated the depositor. The bank did not know that the book had been stolen. After the depositor's death and before payment to the fraudulent presenter, the depositor's executor published the usual probate citation addressed to the heirs-at-law to appear and show cause against the probate of the will. This, however, was no notice to the bank of the death of the depositor. "The fact that such a notice was published," said

<sup>1</sup> *Id.* Other cases in which the claimant sought to show that the bank was negligent in paying deposits are *Wilcox v. Onondaga Co. Sav. Bank*, 40 Hun, 297; *People v. Third Avenue Sav. Bank*, 98 N. Y. 661.

<sup>2</sup> *Levy v. Franklin Savings Bank*, 117 Mass. 448; *Goldrick v. Bristol Co. Sav. Bank*, 123 Mass. 320.

<sup>3</sup> 127 Mass. 183.

the court, "and might have been seen by the bank, bears upon the question of actual negligence on the part of the bank in making the payment. But the jury have found that the defendant was guilty of no negligence, and therefore must have found that it paid without notice of the depositor's death. There is no rule by which the bank can be held conclusively bound to know of the death." The executor therefore failed in his suit to recover the deposit.

§ 182. **Pennsylvania rule.** In Pennsylvania the liability of a bank turned on the following by-law printed in the depositor's book: "If any person shall present a deposit-book at the office of this corporation, and allege himself or herself untrue to be the depositor named therein, and shall thereby obtain from the officers of this corporation the amount deposited, or any part thereof, and the actual depositor shall not have given previous notice at the office of his or her book having been lost or taken from him or her, this corporation will not be responsible for the loss so sustained by any depositor, neither will this institution be liable to make good the same. Provided, that such payment has been entered in the book of the depositor at the time when made." The rule was declared to be reasonable, and that the bank was not liable for money drawn on presentation of the book by another who temporarily abstracted it from the depositor's trunk without his knowledge.<sup>1</sup>

§ 183. **Will presentation of the book protect a bank?** In Connecticut it has been maintained that something more than the existence of a by-law, requiring presentation of the depositor's book, is needful to protect a bank in making payments. The rule "must be inserted in the book and assented to by the depositor."<sup>2</sup> But this view is not countenanced elsewhere. The failure of the depositor through ignorance to ascertain the conditions under which his deposit has been received, will not avail him in the event of loss without neg-

<sup>1</sup> *Burrill v. Dollar Savings Bank*, 92 Pa. 134.

<sup>2</sup> *Eaves v. People's Sav. Bank*, 27 Conn. p. 234.

ligence on the part of the depository.<sup>1</sup> "It would be peculiarly hazardous," said Judge Colt,<sup>2</sup> "to the rights of savings banks if evidence of ignorance on the part of the depositor merely were permitted to control the presumptions which fairly arise from the transaction between them, and which the bank may well rely on."

§ 184. **By-laws govern existing at time of contract.** It may be remarked that the by-laws existing at the time of making a deposit form the contract between both parties and determine their rights and not subsequent by-laws or other regulations. Nor are their rights changed by a by-law existing at the time of making a deposit which clothes the trustees of the bank with power to alter or amend the by-laws.<sup>3</sup> In the case wherein this obviously just principle was stated, the by-law in question was similar to that in the Levy case previously mentioned.<sup>4</sup> The amendment consisted in adding the second sentence. "No notice," said the court, "was given to the plaintiff of the amendment, and she had no knowledge of it and the deposits made after it was passed must be taken to have been made under the original contract. . . The by-law in question is not one which merely concerns the regulations of the institution as to the time and manner of paying deposits to depositors. It materially affects the contract of deposit in the interest of the bank and not of the depositor; and if it applies to contracts made before it was passed, it authorizes the bank to pay the money of depositors to those not authorized by the contract to receive it and to relieve the bank from its obligation to pay it to the depositors. Authority to make such a material change in the contract without the knowledge of the plaintiff cannot be inferred from her agreement to abide by the regulations of the institution."<sup>5</sup>

§ 185. **When book is lost what should bank do.** Whenever the pass-book is lost the depositor, or if dead, the adminis-

<sup>1</sup> *Burrill v. Dollar Savings Bank*, 92 Pa. 134; *Donlon v. Provident Institution*, 127 Mass. 183; *Warhus v. Bowery Savings Bank*, 21 N. Y. 543.

<sup>2</sup> *Donlon v. Provident Institution*, *supra*.

<sup>3</sup> *Kimins v. Boston Five-Cents Sav. Bank*, 141 Mass. 33.

<sup>4</sup> § 181 *a*.

<sup>5</sup> *Kimins v. Boston Five-Cents Sav. Bank*, *supra*.

trator on his estate, must tender a satisfactory bond of indemnity before demanding payment.<sup>1</sup> For, as the by-laws are a part of the contract between the depositor and the bank, it is "as much entitled to the production and offer of the book upon a demand for the deposit, as the maker of a note, payable to bearer, to an offer of the note upon payment when payment is demanded."<sup>2</sup> And if the depositor fraudulently disposes of his book and dies, his administrator may maintain an action against the bank for the deposit on tendering a satisfactory bond of indemnity should the money be needed to pay the depositor's debt.<sup>3</sup> But if money is deposited by an agent who signs on the signature book the name of the principal only and to whom the deposit-book is given, the principal can maintain an action to recover the money after a demand of and refusal by the bank, and the giving to it of an affidavit touching his ownership and circumstances which attended the deposit without tendering a bond of indemnity. The custom of requiring depositors to sign their names when making their first deposit in a signature-book and of not receiving deposits from one person for the benefit of another will not defeat his recovery.<sup>4</sup> And if the administrator on the estate of a depositor is unable to get the book from the family of the deceased, he can recover the money notwithstanding the rule requiring the presentation of the book before payment, should no third party claim it, without giving a bond of indemnity.<sup>5</sup>

**§ 186. Payment on written order without book.** Savings banks have sometimes made regulations for the withdrawal of deposits on the check or other order of the depositor without requiring presentation of the book. Thus in a Pennsyl-

<sup>1</sup> *Wall v. Provident Institution*, 3 Allen, 96; *Heath v. Portsmouth Sav. Bank*, 46 N. H. 78.

<sup>2</sup> *Bartlett, J., Heath v. Portsmouth Sav. Bank*, *supra*; *Mitchell v. Home Sav. Bank*, 38 Hun, 255.

<sup>3</sup> *Wall v. Provident Institution*, 6 Allen, 320.

<sup>4</sup> *Wallace v. Lowell Institution*, 7 Gray, 134.

<sup>5</sup> *Palmer v. Providence Institution*, 14 R. I. 68.

vania bank the by-law provided that deposits might be withdrawn on the check of the depositor properly witnessed. The bank was declared liable to a depositor for money paid on a forged check not witnessed but to a person who had the book. "It was not a question of negligence, and contributory negligence in the depositor was of no consequence. It was a case of mis-payment, contrary to the published rules."<sup>1</sup> So, also, a by-law which provided that money might "be drawn upon the written order of the depositor or his attorney when accompanied by the pass-book," did not protect a bank in paying a deposit to a stranger whose only evidence of authority to receive it was possession of the book.<sup>2</sup> The by-law in this instance also provided that "all payments made by the bank, upon the presentation of the pass-book, and duly entered therein, will be regarded as binding upon the depositor." It was contended that the phrase "all payments" meant any sum of money, delivered by the bank to any person who might for the time being have in his possession the pass-book. "This," said the court "may have been the understanding and intention of the bank in framing the by-law, but in order to make that understanding obligatory upon the customer, it was also necessary that he should have a similar understanding, or that the law should have been expressed in language incapable of any other fair construction. We do not think that the word 'payments,' as used in it, can, according to the legal or common acceptance or meaning of the word, be construed to mean any sums which the bank might choose to disburse, regardless of the person to whom they were made. Payment by a debtor can be legally made only to the creditor or his authorized representative, and in order to constitute any other transaction a payment, it is essential to its validity that it should be authorized by the person entitled to demand it. . . The by-law seems to contemplate but two modes of payment, both of which require the

<sup>1</sup> *People's Sav. Bank v. Cupps*, 91 Pa. 315.

<sup>2</sup> *Smith v. Brooklyn Sav. Bank*, 101 N. Y. 58.

presentation of the pass-book as the condition thereof, one apparently authorizing a payment to the depositor personally, and the other, one which may be made in his absence. The one provides for the conclusive effect of payments made in his absence to a third person, having possession of the pass-book. This provision requires the depositor's written order to accompany the pass-book."

§ 187. **Payment to administrator.** When the depositor dies and his executor or administrator demands the deposit, and shows his authority to act in this capacity, it is usually safe for a bank to pay the deposit. But sometimes, after paying, other parties have demanded it. Most books have a by-law stating that the amount standing to the credit of a depositor on his decease may be paid, when legally demanded, to his representatives. S. made a deposit with a savings bank and received a pass-book which stated that the account was with her "in trust for Christopher Boone." After S.'s death the bank paid the amount to her administrator after producing the pass-book and proper evidence of his authority to administer on her estate. Afterward the beneficiary of the trust sought to recover the deposit of the bank. The court held that in the absence of any notice from the beneficiary the payment to the administrator was valid. The depositor constituted S. trustee and transferred the title to the fund from her individually to her as trustee, and on her death her right as trustee to demand and receive the fund passed to her administrator, and on his demand the bank was required to pay it over, nor wait to inquire into the nature of the trust before doing so.<sup>1</sup> But when a depositor gave his bank-book and an order for the payment of the deposit to his daughter who notified the bank, which after his death paid the amount to his administrator it acted wrongfully, and the daughter recovered the amount.<sup>2</sup>

(a) *Recovery of administrator.* The administrator or execu-

<sup>1</sup> Boone v. Citizens' Sav. Bank, 84 N. Y. 83; Rev. 21 Hun, 235.

<sup>2</sup> Foss v. Lowell Five-Cents Sav. Bank, 111 Mass. 285.

tor can also be sued to recover a deposit improperly paid to him,<sup>1</sup> and the action may be against him individually. In a case of this kind the court said that "the fund now claimed being no part of the testator's estate, defendant was properly sued in his individual capacity."<sup>2</sup>

(b) *Should not pay on presumption of death.* A bank is not protected in paying a deposit to an administrator on the estate of a depositor on producing the book if administration be founded on the presumption of death from seven years' unheard absence.<sup>3</sup>

§ 188. **When depositor may recover though bank has lost heavily.** The laws and regulations of a bank, to which all the depositors assented, declared that twice every year a payment of two per cent. interest should be made; "that although four per cent. is promised, yet every fifth year all the extra income which has not before been paid out and divided will then be divided in just proportion to the length of time the money has been in, according to the by-laws," and that as "people may become sick or otherwise want their money after they have put it in, it is provided that they may take it out when they please." The bank having lost half its funds, though without any fault of the officers, a depositor after due demand of payment and refusal brought his action to recover the amount of his deposit. He recovered, notwithstanding, too, the existence of another by-law whereby the trustees could "at any time divide the whole of the property among the depositors in proportion to their respective interests therein."<sup>4</sup>

<sup>1</sup> *Mabie v. Bailey*, 95 N. Y. 206.

<sup>2</sup> *Anderson v. Thompson*, 38 Hun, 394.

<sup>3</sup> *Jochumsen v. Suffolk Sav. Bank*, 3 Allen, 87.

<sup>4</sup> *Makin v. Savings Institution*, 23 Maine, 350.

## CHAPTER V.

## PAYMENT OF FORGED CHECKS.

§ 189. **Banks must know signatures of depositors.** "The principle is universally maintained that banks and bankers are bound to know the signatures of their customers, and that they pay checks purporting to be drawn by them at their peril. No right or title can be legally claimed through a forgery; and the possession by the bank of a forged check upon which money has been paid affords of itself no ground for claim of credit in account as against the party whose name is forged."<sup>1</sup> In the language of Judge Allen, "for more than a century it has been held and decided, without question, that it is incumbent upon the drawee of a bill, to be satisfied that the signature of the drawer is genuine, that he is presumed to know the handwriting of his correspondent; and if he accepts or pays a bill to which the drawer's name has been forged, he is bound by the act, and can neither repudiate the acceptance nor recover the money paid."<sup>2</sup>

§ 190. **Parties may change the rule.** "While these are the strict and necessary rules as against banks and bankers, their operation may be varied by the acts and conduct of the parties for whose benefit and protection they are intended to be enforced. If, for instance, a customer of a bank, having a deposit account and who is in the habit of drawing checks upon that account, should, by words or acts, cause the bank, the latter acting upon such reasonable grounds as prudent business men generally act, to make payment on a forged

<sup>1</sup> Alvey, J., *Hardy v. Chesapeake Bank*, 51 Md. p. 585.

<sup>2</sup> *National Park Bank v. Ninth Nat. Bank*, 46 N. Y. 77, p. 80. If a bank pay the forged check of a depositor it cannot charge the same to his account. Payment of a forged check is no payment, *Leavitt v. Stanton, Hill & Denio*, Supp. 413.



check, such customer would not be allowed, as against the bank to set up the forgery that he, by his conduct, had induced the bank to act as on a genuine check.”<sup>1</sup>

§ 191. **Hardy's case.** In the case of *Hardy v. Chesapeake Bank*, the action was begun to recover a balance due on bank account. The bank having notified Hardy that his account was overdrawn, he discovered that a considerable amount had been paid out on forged checks which were charged to his account. At the trial fourteen forged checks were produced which had been entered in Hardy's bank-book. Five were included among the checks entered and balanced on the 13th of July, 1873, and the others were dated, paid, and charged prior to October 6th of that year, when his bank-book was again balanced. On each occasion of balancing the bank-book the cancelled checks were returned to Hardy, and the balance was carried forward to his credit. Holmes, the forger, was Hardy's confidential clerk and book-keeper, and all the checks in question were taken from Hardy's check-book and filled in Holmes's handwriting. He was entrusted with Hardy's bank-book, check-book, and with the checks returned by the bank, and he entered in the bank-book all the checks paid by the bank except the four last. “It was his business to enter the checks in the bank-book and to superintend the writing up and balancing the account with the bank, and to keep himself informed of the true state of the account.” The forgery was discovered by Hardy on the 10th of October, four days after the balancing of his account which included the sums of the later forged checks.

(a) *What the jury should have determined.* The bank defended on several grounds, one of which was that “it had been misled and induced to honor and pay the checks drawn by Holmes by the negligent conduct and apparent acquiescence” of Hardy. The jury having rendered a verdict for Hardy only for the amount of the first five checks and interest, he appealed claiming that the court ought to have

<sup>1</sup> Alvey, J.; *Hardy v. Chesapeake Bank*, 51 Md. p. 585.

submitted to the jury the question whether he was guilty of negligence with respect to the bank account, and whether, if there was negligence at all, it was of a character to mislead and did actually mislead the bank, and induced it to act on the belief that as all the checks paid to him on the 13th of July, 1873, and which had remained without objection, all checks similarly drawn and presented for payment after that date were unobjectionable. The Court of Appeals in reviewing the case said that the jury should have been required to find either that Hardy had knowledge in fact that the forgeries had been committed, or that from carelessness and indifference to the rights of others, he failed to inform himself from sources of information readily accessible to him, and which, by the exercise of ordinary diligence as a business man would have declared to him the fact that the forgeries had been committed. If such facts existed then it must be also found that the bank in honoring and paying the nine checks in question was misled into paying them by Hardy's conduct in failing to make known his objection to the account as stated and balanced in the bank-book on the 13th of July, 1873, in order to be entitled to a verdict. In other language, if Hardy knew of the forgeries or misled the bank by his conduct after the balancing of his bank-book in July, he was estopped from questioning the genuineness of the checks or the authority of Holmes to draw them.

§ 192. **Law of estoppel.** The court remarked in Hardy's case that "this doctrine of estoppel is applied in a great variety of circumstances, but its great object is to prevent injustice being done where one party has been led into error by the fault or fraud of the other. It is a most valuable doctrine for the promotion of justice, but it can have no application except the party invoking it can show that he has been induced to act or refrain from acting by the acts or conduct of the adverse party under circumstances that would naturally and rationally influence ordinary men. It can, therefore, only be set up and relied on by a party who has been actually misled to his injury; for if not so misled, he can

have no ground for the protection that the principle affords. . . In the recent case of *Arnold v. The Cheque Bank*,<sup>1</sup> where the principle was extensively discussed as to its application to the negligent conduct of the party suing, it was held, following the previous cases, that negligence to create an estoppel must be in the transaction itself and be the proximate cause of leading the third party into mistake, and also must be the neglect of some duty which is owing to such third party, or to the general public. What is such duty may not in all cases be easy to determine, but we think it not too much to say that in a case like the present, there is a duty owing from the customer to the bank to act with that ordinary diligence and care that prudent business men generally bestow in such cases, in the examination and comparison of the debts and credits contained in his bank- or pass-book in order to detect any errors or mistakes therein. More than this, under ordinary circumstances, could not be required."

(a) *Applied by United States Supreme Court.* So, too, the Supreme Court of the United States, speaking through Judge Harlan, in a recent case,<sup>2</sup> remarked that "where a duty is cast upon a person, by the usages of business or otherwise, to disclose the truth, which he has the means, by ordinary diligence, of ascertaining, and he neglects or omits to discharge that duty, whereby another is misled in the very transaction to which the duty relates, he will not be permitted, to the injury of the one misled, to question the construction rationally placed by the latter upon his conduct. This principle commends itself to our judgment as both just and beneficent; for, as observed by the Supreme Court of Ohio,<sup>3</sup> while in the forum of conscience there may be a wide difference between intentional injuries and those arising from negligence, yet no man conducts himself 'quite as absolutely in this world as though he was the only man in it; and the very existence of society

<sup>1</sup> L. R., 1 C. P. Div. 578.

<sup>2</sup> *Leather Manufacturers' Bank v. Morgan*, 117 U. S. 96, p. 112. The doctrine of estoppel is discussed at considerable length, and many cases are cited.

<sup>3</sup> *Ellis v. Ohio Life Ins. & Trust Co.*, 4 Ohio St. 628, p. 667.

depends upon compelling every one to pay a proper regard to the rights and interests of others. The law, therefore, proceeding upon the soundest principles of morality and public policy, has adapted a large number of its rules and remedies to the enforcement of this duty. In almost every department of active life rights are in this manner daily lost and acquired, and we know of no reason for making the commercial classes an exception.'”

(b) *In Illinois.* Another application of this principle was sought in a case in Illinois which is worth giving. The holder of a forged check, which he received innocently, but afterward learned was a forgery, presented it to the drawee bank and demanded payment without saying anything about its character. The teller remarked that as he questioned the genuineness of the check he would pay only on condition that the holder would indorse it. Having done so the holder received his money. A few hours afterward the bank discovered the forgery. In an action to recover the money the holder maintained that the bank was estopped from saying that it was mistaken in the drawer's signature. But the court decided that the principle of estoppel could not be applied to such a case. “The doctrine of estoppel . . . concerns conscience and equity, and the party who would avail of it must himself have acted in good faith toward the party on whose conduct he relied, or it will constitute no bar to the assertion of the truth.”<sup>1</sup>

§ 193. **Money paid on forged check not recoverable.** (a) *Reason for the rule.* Though money paid by mistake can generally be recovered back, yet the payment of forged paper has long formed an exception to this rule. In other words, whenever payment is made by the drawee of a forged bill or check to a holder without his fault, and his situation would be made worse if compelled to refund, the money cannot be

<sup>1</sup> First Nat. Bank v. Ricker, 71 Ill. 439, p. 446, citing *Hefner v. Vandolah*, 57 Id. 520.

recovered from him.<sup>1</sup> "The foundations of the rule," said Judge Ranney, "are sufficiently obvious. The party is supposed to know his own handwriting in the one case, or that of his customer or correspondent in the other, much better than the holder can; and the law, therefore, allows the holder to cast upon him the entire responsibility of determining as to the genuineness of the instrument, and if he fails to discover the forgery, imputes to him negligence, and, as between him and the innocent holder, compels him to suffer the loss."<sup>2</sup>

(b) *Should find out whether check is genuine.* "The foundation upon which the drawee is made to suffer the loss is the imputed negligence in accepting or paying until he has ascertained the bill [or check] to be genuine; and, in case of payment, notwithstanding he has done it in mistake, and parts with his money without receiving the supposed equivalent, and notwithstanding the holder has obtained the money without consideration, the former cannot be relieved from the consequences of his negligence at the expense of the latter, and the latter may in equity and good conscience retain what he has got."<sup>3</sup>

§ 194. **If holder be negligent he cannot retain money.** (a) *Illustration.* The above rule can be invoked only "in favor of a holder without fault and for a valuable consideration." Therefore the holder may "by his own negligent conduct place himself in such an inequitable position in reference to

<sup>1</sup> If forged checks are paid to an innocent holder the money cannot be recovered back, *Weisser v. Denison*, 10 N. Y. p. 75; *Price v. Neal*, 3 Burr. 1354; *Goddard v. Merchants' Bank*, 4 N. Y. 147; *Bank of Commerce v. Union Bank*, 3 Id. 230.

<sup>2</sup> *Ellis v. Ohio Life Ins. & Trust Co.*, 4 Ohio St., p. 652; *Price v. Neal*, 3 Burr. 1354; *Young v. Adams*, 6 Mass. 182; *Markle v. Hatfield*, 2 Johns. 455; *Smith v. Mercer*, 6 Taunt. 80; *Cocks v. Masterman*, 9 Barn. & Cr. 902; *Gloucester Bank v. Salem Bank*, 17 Mass. 33; *United States Bank v. Bank of Georgia*, 10 Wheat. 333; *Levy v. Bank of United States*, 4 Dall. 234; *Bank v. Farmers and Mechanics' Bank*, 10 Vt. 141; *Levy v. Bank of United States*, 1 Binn. 27; *National Bank v. Grocers' Nat. Bank*, 35 How. Pr. 412; *Commercial and Farmers' Nat. Bank v. First Nat. Bank*, 30 Md. 11; *Salt Springs Bank v. Syracuse Sav. Institution*, 62 Barb. 101.

<sup>3</sup> Judge Ranney.

the drawee as to deprive himself of the benefit of this rule, and make it unjust and inequitable that he should keep what he has obtained by a mistake, and for which he has given no equivalent." Thus "where the negligence reaches beyond the holder and necessarily affects the drawee, and consists of an omission to exercise some precaution, either by the agreement of the parties or the course of business devolved upon the holder in relation to the genuineness of the paper, he cannot in negligent disregard of this duty retain the money received upon a forged instrument."<sup>1</sup>

(b) *Paying before seeing bill.* In *Goddard v. Merchants' Bank*,<sup>2</sup> the signature of the drawer was forged, and the bill was paid the day after it was protested by the plaintiff for the honor of the drawer. The bill purported to have been drawn by a bank in Ohio upon the American Exchange Bank in New York, and was indorsed by the person who forged it to the bank of Rutland, Vt., by which it was transmitted to the defendant for collection. In consequence of the absence, from his office, of the notary, in whose hands it was placed, the plaintiff did not see the bill at the time of paying it, but he left word to have it sent to his place of business. On seeing the bill the next day he pronounced it a forgery and demanded back the money. The court decided that he could recover, admitting "that he occupied the same position as the drawee would; but as he paid the bill without an opportunity of judging whether it was signed by his correspondents or not, and upon the representation of the holders that they had such a bill, that he could not be held to have admitted the genuineness of the signature. And although the forgery was discovered too late to give notice of protest, they held that no such notice was necessary, as the defendants had the

<sup>1</sup> *Ellis v. Ohio Life Ins. & Trust Co.*, 4 Ohio, p. 652, citing *National Bank v. Bangs*, 106 Mass. 441; *Wilkinson v. Johnson*, 3 Barn. & Cr. 428; *Canal Bank v. Bank of Albany*, 1 Hill, 287; *Bank of Commerce v. Union Bank*, 3 N. Y. 230.

<sup>2</sup> 4 N. Y. 147.

bill only for collection and needed no recourse, and the payee who forged it was liable to the owners without notice."<sup>1</sup>

§ 195. **To retain the money bank alone must be wrong.** "To entitle the holder to retain money obtained by mistake upon a forged instrument, he must occupy the vantage ground by putting the drawee alone in the wrong; and he must be able truthfully to assert that he put the whole responsibility upon the drawee, and relied upon him to decide, and that the mistake arising from his negligence cannot now be corrected without placing the holder in a worse position than though payment had been refused. If the holder cannot say this, and, especially, if the failure to detect the forgery and consequent loss can be traced to his own disregard of duty in negligently omitting to exercise some precaution which he had undertaken to perform, he fails to establish a superior equity to the money, and cannot with a good conscience retain it. To allow him to do so, would be to permit him to take advantage of his own wrong, and to pervert a rule, designed for his protection against the negligence of the drawee, into one from doing injustice to him."<sup>2</sup>

§ 196. **If both parties innocent money can be recovered.** (a) *Remarks on Ohio case.* But if both parties are equally innocent, or equally in fault, and a check is paid on a mutual mistake of facts, "in respect to which both were equally bound to inquire," it may be recovered back. In the Ohio case there was every reason to believe, so the court remarked, that if the banking company had required the person presenting the check to identify himself, he would have declined the ordeal and it would not have been bought or paid. The loss, therefore, might be traced directly to its negligence. But whether this would have prevented the fraud or not it was enough that both parties were bound to inquire, and allowing both to be at fault, the money could be recovered.

<sup>1</sup> 2 Judge Ranney's statement of the case in *Ellis v. Ohio Life Ins. & Trust Co.*, 4 Ohio St., p. 658.

<sup>2</sup> *Ellis v. Ohio Life Ins. & Trust Co.*, *supra*, p. 662.

(b) *In an early Massachusetts case*<sup>1</sup> the rule is thus stated: "If the loss can be traced to the fault or negligence of either party, it shall be fixed upon him. Generally, where no fault or negligence is imputable it has been suffered to remain where the course of business has placed it." And Kingman, C. J., in a Kansas case, has added: "This seems to us a just and fair exposition of the law. It is a principle of natural justice that where a loss has happened, he, through whose means it happened, should sustain it, although innocent, rather than he who is not only innocent but wholly without the imputation of negligence."<sup>2</sup> In Minnesota,<sup>3</sup> if both parties are negligent in the payment of a forged draft, the loss must fall on the drawee.

(c) *Loss through holder's negligence.* A forged check payable to the order of a merchant in Texas was presented by him for payment to a bank. He was in good standing, and having indorsed the check it was paid. On another occasion he had received a check signed by the same party but with a different name; this fact, however, he did not communicate to the bank. As soon as the party in whose name the forged check was drawn received and examined his bank statement (which was more than a month afterward) he notified the merchant of the fact. The latter was obliged to repay the bank because he was regarded negligent in not mentioning before receiving his money the suspicious circumstances relating to the check.<sup>4</sup>

(d) *Third party's check taken without inquiry.* In applying the rule in Massachusetts it has been decided that if the payee take a check drawn payable to his order from a stranger or third person without inquiry, though in good faith and for value, and give it currency and credit by indorsement before receiving the money thereon, the drawee may recover the same.<sup>5</sup>

<sup>1</sup> Gloucester Bank v. Salem Bank, 17 Mass. p. 42.

<sup>2</sup> National Bank v. Tappan, 6 Kansas, p. 466.

<sup>3</sup> Bernheimer v. Marshall, 2 Minn. 78.

<sup>4</sup> Rouvant v. San Antonio Nat. Bank, 63 Texas, 610.

<sup>5</sup> National Bank v. Bangs, 106 Mass. 441.



(e) *Sending letter with check by clerk to post-office.* A merchant sent by his clerk to the post-office a sealed letter containing a bank-check drawn by himself payable to A. B. or order. The clerk opened the letter and passed the check by forging the words "or bearer," after "A. B.," and before "or order," and by obliterating the latter words. In a suit to recover the amount of the check, which was withheld by the bank because it had paid the same, the merchant was declared not negligent in giving the check to his clerk to be mailed.<sup>1</sup>

§ 197. **Alteration of check after delivery by drawer.** If a check be altered after delivery by the drawer, what is the drawee's duty when it is presented for payment?<sup>2</sup> In *Crawford v. West-Side Bank*<sup>3</sup> this question was answered. "In disbursing the customer's funds, it can pay them only in the usual course of business, and in conformity to his directions. In debiting his account it is not entitled to charge any payment except those made at the time when, to the person whom, and for the amount authorized by him.<sup>4</sup> . . . The bank is from necessity responsible for any omission to discover the original terms and conditions of a check, once properly drawn upon it, because at the time of payment, it is the only party interested in protecting its integrity, who has the opportunity of inspection, and it therefore owes the duty to its depositors of guarding the fund intrusted to it from spoliation. . . . The liability of the banker, however, for a loss occasioned by neglect to exercise such vigilance, is confined to the maker alone."

<sup>1</sup> *Belknap v. National Bank*, 100 Mass. 376.

<sup>2</sup> In *Hall v. Fuller*, 5 Barn. & Cr. 750, a check was drawn by a customer on his banker for a sum of money described in the body of the check in words and figures which were altered by the holder who substituted a larger sum for that mentioned in the check, but in such a manner that no person in the ordinary course of business could detect the alteration, and the banker paid the amount. Nevertheless, he could not charge the customer for anything beyond the sum for which the check was originally drawn.

<sup>3</sup> 100 N. Y. 50. For recovery of money paid on a raised check, see § 353.

<sup>4</sup> *Wheeler v. Gould*, 20 Pick. 545.

§ 198. **Liability of collecting bank for forged check.** If a forged check be sent for collection and collected, but the forgery is discovered and the money is returned to the source whence it came, the sender can sustain no action against the collecting bank. Thus, the defendant bank agreed with O. & Co. to take up each day at the clearing house all of its commercial paper presented there by other banks. When notified by the bank of the amount, O. & Co. were to send their check therefor and to receive the paper, and if, on inspection, any portion should prove not to be good, O. & Co. on sending it back before the close of banking hours, were to be credited for the amount. On a certain day O. & Co. received the usual statement and sent a check for the amount, receiving in return the checks and other documents contained in the statement. Among them was a forged certificate of deposit, purporting to be signed by O. & Co. which had not been presented at the clearing house, but by the plaintiff to the defendant bank for collection. The certificate was examined by O. & Co.'s cashier after receiving it, who passed the same to the book-keeper. After the close of banking hours the forgery was discovered, and O. & Co. immediately notified the plaintiff and others interested in the check. On the next day O. & Co. returned the certificate to the defendant bank and were credited with the amount. In an action to recover the amount of the bank by the person who had sent it there for collection, the court held that the payment by O. & Co. did not preclude them from claiming a restitution of the money; that the action of the cashier was not a binding recognition of the genuineness of the certificate, nor did the failure to discover and give notice of the forgery during business hours render the previous conditional payment absolute, and, therefore, the defendant bank was justified in refunding the money.<sup>1</sup>

<sup>1</sup> *Allen v. Fourth Nat. Bank*, 59 N. Y. 12. A person gave his check for the purchase of a note and mortgage which were represented to be genuine, payable to the order of the owner of the land, and delivered it to the broker who negotiated the sale. In fact, he had forged the note and mortgage, but, identifying to the drawee bank a person whom he represented to be the

**§ 199. Bank-book presumed to be correct unless disputed.**

(a) *Remarks of Alvey, J.* We shall close the chapter with an inquiry into the depositor's duty to examine his bank-book after the balancing of his account and the return of his cancelled checks. If no objection be made after a reasonable time, the presumption arises that the account is correct. "Such presumption arises from the natural and usual habits of careful business men to examine and scrutinize such accounts when rendered; but the presumption is liable to be repelled by showing that the error or fraud complained of was not discoverable by the exercise of reasonable care and diligence, or that there was no such appearance of things as to excite the suspicion of a reasonable man, or that, for any reason, the party had not had an opportunity to examine the account."<sup>1</sup>

(b) *Presumption may be disproved.* But this presumption will not keep out the truth. Thus a bank in New York drew three drafts on another bank in the same State on the first of June, which were duly paid and charged to it, but which it was discovered on the 18th of July had been raised. In an action to recover the difference between the amount paid and which ought to have been paid, it was held that the delay in examining the accounts did not operate to the prejudice of the defendant, and that the plaintiff could show what the real transaction was.<sup>2</sup>

**§ 200. Agent's wrongful action will not bind principal.** (a) *Remarks of Allen, J.* When a depositor's account with a bank is settled by his agent, a book-keeper or confidential clerk for example, and forged checks are charged therein of which the clerk has knowledge and in which he has participated, the settlement will not bind his principal and prevent him

payee, the money was paid to him. When the mortgage became due the maker of the check discovered the fraud and notified the bank and subsequently recovered the amount of his check, *Kuhn v. Frank, Hamilton Co. Dis. Ct. Ohio*, 10 Rec. 622.

<sup>1</sup> *Alvey, J., Hardy v. Chesapeake Bank*, 51 Md. p. 587.

<sup>2</sup> *First Nat. Bank v. Continental Nat. Bank*, 17 Week. Dig. 42.

from recovering the amount of forged checks thus charged to his account. "The principle that notice to an agent is notice to the principal is quite familiar, but is only applicable to cases in which the agent is acting in the course of his employment. Were it otherwise, and did it extend to acts unauthorized and outside of the employment, whether trespasses or even felonies, the master might be made responsible for all acts, whether tortious or otherwise, done by his servant while in his employ or acting professedly in his behalf, if he did not act at once by disclaiming the authority."<sup>1</sup>

(b) *Hardy's case*. Likewise Judge Alvey in the Hardy case, previously reviewed, remarks that "the fraudulent knowledge of the agent in regard to acts and transactions outside of and beyond his employment cannot be imputed to his principal. To do so would work the grossest injustice and lead to the most anomalous consequences."<sup>2</sup>

(c) *Welsh v. German American Bank*.<sup>3</sup> Welsh, a commission merchant, had a book-keeper who had charge of his produce and bank-books. The book-keeper presented fictitious accounts of sales of the property of a customer to his employer, and also checks for him to sign. These were payable to the order of the customer, and were delivered to the book-keeper. He forged the customer's indorsement and put them in circulation. They were paid by the bank, charged in Welsh's pass-book, and returned with the other vouchers to the book-keeper on balancing the account, which was done monthly. Welsh did not discover the fraud or the forgeries for several months, but as soon as he did the bank was notified. In an action to recover the balance of his deposit it was held that the deceiving of him whereby he gave the checks to his book-keeper did not make him responsible for the subsequent fraud on the bank, as his acts in a legal sense did not contribute to that event, that he was not precluded from disputing the

<sup>1</sup> Allen, J., *Weisser v. Denison*, 10 N. Y. p. 77; *Welsh v. German American Bank*, 73 N. Y. 424.

<sup>2</sup> 51 Md. p. 588.

<sup>3</sup> 73 N. Y. 424; Aff. 42 N. Y. Sup. Ct. 462..

right of the bank to charge the checks to his account because of the entry in the pass-books, their return with the vouchers, and the retaining of them without objection, and that he could recover.

(d) *Dana v. National Bank*.<sup>1</sup> A depositor drew his check on a bank for a sum payable to the order of a person named therein. The depositor's clerk, Piper, erased the name of the payee and obtained the money on the check from the bank. Statements were sent by the bank to the depositor which included, among other payments, the check in question, and no objection was made thereto until twenty-three months after the paying of it. He had then closed his account with the bank. In an action by the depositor to recover the amount, it was held first, that the bank could not legally claim that if, after a reasonable opportunity to examine the checks returned he did not object to the payment of this particular one, he would be presumed to ratify it; second, that the question of ratification was one for the jury; third, that the depositor was bound to use diligence in discovering the forgery, and was affected by the knowledge which the clerk had who committed the forgery, and whose duty it was to examine the checks returned by the bank. On this latter point the court remarked that "the plaintiffs owed to the defendant the duty of exercising due diligence to give it information that the payment was unauthorized; and this included not only due diligence in giving notice after knowledge of the forgery, but also due diligence in discovering it. If the plaintiffs knew of the mistake, or if they had that notice of it which consists in the knowledge of facts which, by the exercise of due care and diligence will disclose it, they failed in their duty; and adoption of the check and ratification of the payment will be implied. They cannot now require the defendant to correct a mistake to its injury from which it might have protected itself but for the negligence of the plaintiffs. Whether the plaintiffs were required in the exercise of due diligence to read the monthly statements or to examine the checks,

<sup>1</sup> 132 Mass. 156, p. 158.

and how careful an examination they were bound to make and what inferences are to be drawn, depend upon the nature and course of dealing between the parties and the particular circumstances under which the statements and checks were delivered to them. . . There was evidence that the plaintiffs did examine the statements and checks so far as to see that the checks returned corresponded with the amounts in the stub of the check-book. Whether this was all the examination required we need not consider. The plaintiffs made that examination, and are affected with the knowledge it would give, though it was made by Piper. He was their agent for that purpose. The check in question was dated November 20, and was drawn to the order of Revere Sugar Refinery, to pay a bill due to the payee, payable either November 20 or December 10, at the option of the plaintiffs, who rarely allowed such bills to run over ten days. On December 10 a duplicate of the same bill was presented to the plaintiffs, and paid by a check on another bank. Whatever inference as to knowledge of this double payment and misuse of the check of November 20 may be drawn from the knowledge the plaintiffs may have had of their own accounts with the Revere Sugar Refinery, and from the examination of the check-book, is not to be affected by the fact that the examination was made by Piper. . . If the examination made by Piper as agent for the plaintiffs, and the information which came to him within the scope of his agency, were sufficient to have given him notice of the forgery of the check of November 20, it does not lie in the mouth of the plaintiffs to say that he did not acquire that knowledge as their agent, so as to affect them with it. If such examination would have given them notice if made by an honest agent, they cannot affect ignorance because they were made by a dishonest agent, who had fraudulent knowledge of the fact."<sup>1</sup>

<sup>1</sup> The court also said: "The evidence offered by the defendant would show that the plaintiffs received the monthly statements in December and January,

(e) *Louisiana case*.<sup>1</sup> An interesting case was tried in Louisiana, in which the bank was exonerated from paying to a depositor in consequence of his conduct in ratifying the wrongful acts of his agent in drawing and procuring payment of a check. F., the plaintiff, had a book-keeper who kept his cash account and made the deposits with a bank which well understood the relations between the two. The book-keeper drew a check on the bank for \$2500 to which he forged F.'s signature. As the amount exceeded F.'s deposit the bank notified him of the fact. When he appeared there he was shown the check, which he said he had not signed, but did not say that it was forgery. On seeing his book-keeper he reported to the bank that it was all right. Subsequently, the book-keeper drew another check for \$1700, forging F.'s signature, and which the bank paid on presentation. Discovering the second forgery by the book-keeper, F. denounced the act, and brought a suit to recover the balance of his deposit including these checks. The court held that his act in ratifying the first act of forgery exonerated the bank from liability to pay it, and that by afterward keeping the book-keeper in his confidential employ he misled the bank and threw it off its guard, and excused it for paying the second check which was similarly drawn; in other words that F. had caused his own injury and therefore must bear the loss.

§ 201. **Is depositor required to examine book to detect forgery.** (a) *Weisser v. Denison*.<sup>2</sup> A depositor is not required

and closed their account in January with such knowledge as would be inferred from the facts proved. Whether that was notice of the forgery, or would have called for further examination, and led to the discovery of it was a proper question for the jury. This evidence should have been admitted and submitted to the jury upon the question whether the mistake would have been discovered, but for the negligence of the plaintiffs or their agents, or the fraudulent conduct of Piper in regard to acts within the scope of his agency; and whether the examinations made by the plaintiffs or their agents were such as to lead to a discovery of the forgery and affect the plaintiffs with the notice of it."

<sup>1</sup> *De Feriet v. Bank of America*, 23 La. Ann. 310.

<sup>2</sup> 10 N. Y. 68.

to examine his book or vouchers for the purpose of detecting the forgery of his name. This principle was announced in a case of checks forged by the confidential clerk of the depositor who at the request of his principal on a particular occasion examined the book and checks after they had been returned from the bank and reported them all right and thus delayed the detection of the forgery which he had committed. Indeed, the forgery was not discovered for several months, but immediately after the discovery the depositor informed the bank, and on its refusal to credit him for the amount of the forged check he sued the institution and recovered the amount.

(b) *Frank v. Chemical National Bank*.<sup>1</sup> The principle above stated was reaffirmed by the same court nearly thirty years afterward. Judge Andrews in speaking for the court said: "It does not seem to be unreasonable, in view of the course of business and the custom of banks to surrender its vouchers on the periodical writing up of the accounts of depositors to exact from the latter some attention to the account when it is made up, or to hold that the negligent omission of all examination may, when injury has resulted to the bank which it would not have suffered if such examination had been made and the bank had received timely notice of objections, preclude the depositor from afterward questioning its correctness. But where forged checks have been paid and charged in the account and returned to the depositor, he is under no duty to the bank so to conduct the examination that it will necessarily lead to the discovery of the fraud. If he examines the vouchers personally and is himself deceived by the skilful character of the forgery, his omission to discover it will not shift upon him the loss which in the first instance is the loss of the bank. Banks are bound to know the signatures of their customers, and they pay checks purporting to be drawn by them at their peril. If the bank pays forged checks it commits the first fault. It cannot visit the conse-

<sup>1</sup> 84 N. Y. 209.



quences upon the innocent depositor who, after the fact, is also deceived by the simulated paper. So, if the depositor in the ordinary course of business commits the examination of the bank account and vouchers to clerks or agents, and they fail to discover checks which are forged, the duty of the depositor to the bank is discharged, although the principal, if he had made the examination personally, would have detected them. The alleged duty at most only requires the depositor to use ordinary care; and if this is exercised, whether by himself or his agents, the bank cannot justly complain, although the forgeries are not discovered until it is too late to retrieve its position or make reclamation from the forger.”<sup>1</sup>

(c) *Leather Manufacturers' Bank v. Morgan*.<sup>2</sup> We shall fittingly close this lengthy review of the cases by adding the opinion of the supreme federal tribunal in Morgan's case. The suit was brought by him to recover the balance alleged to be due on a deposit account opened at that bank in the name of “Wm. B. Cooper, Junior, agent for Ashburner & Co.” Cooper's book-keeper, Berlin, who had charge of the account, filled up all the checks drawn thereon and entered them in a book kept for that purpose. Some of these were altered by Berlin “with great care,” in the language of the finding in the case, and could not be detected without very careful scrutiny, or a very close examination. The bank paid the “full raised amount” of the checks. Berlin paid Cooper the original amount and kept and applied the balance for gambling. In delivering the opinion of the court, Judge Harlan said<sup>3</sup> “there was evidence tending to show—we do not say beyond controversy—that Cooper failed to exercise that degree of care which, under all the circumstances, it was his duty to do; he knew of the custom of the defendant to balance the pass-books of its depositors and return their checks ‘as vouchers’ for payments; yet he did not examine his

<sup>1</sup> Frank v. Chemical Nat. Bank, 84 N. Y. 209, p. 213.

<sup>2</sup> 117 U. S. 96.

<sup>3</sup> P. 112.

pass-book and vouchers to see whether there were any errors in the account to his prejudice, and, therefore, he could give no notice of any. Of course, if the defendant's officers, before paying the altered checks, could by proper care and skill have detected the forgeries, then it cannot receive a credit for the amount of those checks, even if the depositor omitted all examination of his account. But if by such care and skill they could not have discovered the forgeries, then the only person unconnected with the forgeries who had the means of detecting them was Cooper himself. He admits that by such an examination as that of March, 1881 [when Berlin, having stayed away from the office for a day, he compared his pass-book with the stubs of the check-book, and ascertained that a certain number of checks, appearing on the stubs, were not charged against him in his pass-book, and did not appear to have been returned by the bank, while others, which appeared on the pass-book to have been charged against and returned to him, did not appear, by the stub of the check-book, to have ever been drawn],<sup>1</sup> he could easily have discovered them on the balancings of October 7, 1880, November 19, 1880, and January 18, 1881. If he had discovered that altered checks were embraced in the account, and failed to give due notice thereof to the bank, it could not be doubted that he would have been estopped to dispute the genuineness of the checks in the form in which they were paid.<sup>2</sup> . . This, however, could not be, if, as claimed, the depositor was under no obligation whatever to the bank to examine the account rendered at his instance, and notify it of errors therein in order that it might correct them, and, if

<sup>1</sup> From the statement of facts, p. 100.

<sup>2</sup> "Upon the principle stated by Lord Campbell in *Carncross v. Lorimer*, 3 Macq. 827, 830, that 'if a party having an interest to prevent an act being done, has full notice of its having been done, and acquiesces in it, so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had been done by his previous license.' "

necessary, take steps for its protection by compelling restitution by the forger. But if the evidence showed that the depositor intentionally remained silent, after discovering the forgeries in question, would the law conclusively presume that he had acquiesced in the account as rendered, and infer previous authority in the clerk to make the checks, and yet forbid the application of the same principle where the depositor was guilty of neglect of duty in failing to do that, in reference to the account, which he admits would have readily disclosed the same fraud? It seems to the court that the simple statement of this proposition suggests a negative answer to it.

“It seems to us that if the case had been submitted to the jury, and they had found such negligence upon the part of the depositor as precluded him from disputing the correctness of the account rendered by the bank, the verdict could not have been set aside as wholly unsupported by the evidence. In their relations with depositors, banks are held, as they ought to be, to rigid responsibility. But the principles governing those relations ought not to be so extended as to invite or encourage such negligence by depositors in the examination of their bank accounts as is inconsistent with the relations of the parties or with those established rules and usages sanctioned by business men of ordinary prudence and sagacity, which are or ought to be known to depositors.<sup>1</sup>

“We must not be understood as holding that the examination by the depositor of his account must be so close and thorough as to exclude the possibility of any error whatever being overlooked by him. Nor do we mean to hold that the depositor is wanting in proper care when he imposes upon some competent person the duty of making that examination and of giving timely notice to the bank of objections to the account. If the examination is made by such an agent or clerk in good faith and with ordinary diligence, and due notice given of any error in the account, the depositor discharges

<sup>1</sup> P. 115.

his duty to the bank. But when, as in this case, the agent commits the forgeries which misled the bank and injured the depositor, and, therefore, has an interest in concealing the facts, the principal occupies no better position than he would have done had no one been designated by him to make the required examination—without, at least, showing that he exercised reasonable diligence in supervising the conduct of the agent while the latter was discharging the trust committed to him. In the absence of such supervision, the mere designation of an agent to discharge a duty resting primarily upon the principal cannot be deemed the equivalent of performance by the latter. While no rule can be laid down that will cover every transaction between a bank and its depositor, it is sufficient to say that the latter's duty is discharged when he exercises such diligence as is required by the circumstances of the particular case, including the relations of the parties, and the established or known usages of banking business."

§ 202. **Bank not liable for loss in Pennsylvania.** In Pennsylvania, however, the rule that the drawee is responsible for payments to the wrong person, even though done through forgery, was changed in 1849 by statute; the drawee, therefore, in that State can recover from the holder the money thus erroneously paid. In applying that statute, it has been decided that the amount of a draft on a Pittsburgh bank payable to the order of the drawer, which passed to a Philadelphia bank and was paid through the clearing house, could be recovered of the latter bank.<sup>1</sup> And when a forged check was presented on Saturday to the defendant bank, and on Monday it was presented to the plaintiff bank through the clearing house, and the next day the forgery was discovered and the defendant bank was notified and payment demanded, there was no negligence in giving notice and making demand.<sup>2</sup> Indeed, "want of care or negligence in paying a forged bill

<sup>1</sup> *Tradesmen's Nat. Bank v. Third Nat. Bank*, 66 Pa. 435.

<sup>2</sup> *Corn Ex. Nat. Bank v. National Bank*, 78 Pa. 233; *Rev. 9 Phila.* 133.

will not alone, since the Act of 1849, preclude the payer from recovering back the money."<sup>1</sup>

§ 203. **Notice of forgery must be given.** When the forgery is discovered notice must be given to the bank.<sup>2</sup> If the notice be delayed for two months or even fifteen days the drawee cannot recover.<sup>3</sup> In one case for the recovery of forged bank notes, the court said "that the party receiving such notes must examine them as soon as he has opportunity and return them immediately."<sup>4</sup>

§ 204. **Recovery of forged bank notes.** When can a bank recover its forged notes in the possession of individuals? In *Coffin v. Anderson*<sup>5</sup> A. obtained bank notes from a bank by forgery and exchanged them with another bank and with individuals for other bank notes. It was decided that the bank whose notes had thus been forged was entitled to the notes which A. had received in exchange for the forged ones.

§ 205. **Drafts drawn against forged bills of lading.** If a banker receive instructions from his customer to accept bills of exchange which a correspondent shall draw against bills of lading, he is not bound to ascertain their genuineness before accepting or paying the bills of exchange which are drawn against them. Moreover, if the bills of lading should prove to be forgeries, the banker could recover the amount paid on the bills of exchange.<sup>6</sup>

<sup>1</sup> Thayer, J., *Union National Bank v. Chambers*, 9 Phila. p. 131.

<sup>2</sup> *Ellis v. Ohio Life Ins. & Trust Co.*, 4 Ohio St. 628; *Goddard v. Merchants' Bank*, 4 N. Y. 147; *National Bank v. Tappan*, 6 Kansas, 456.

<sup>3</sup> *Bank of St. Albans v. Farmers & Mechanics' Bank*, 10 Vt. 141.

<sup>4</sup> *Gloucester Bank v. Salem Bank*, 17 Mass. 33, p. 45.

<sup>5</sup> 4 Blackf. 395.

<sup>6</sup> *Woods v. Thiedemann*, 1 H. & C. 478. See *Ulster Bank v. Synnott*, 5 Ir. Eq. 595.

## CHAPTER VI.

## PAYMENT ON LEGAL AND FORGED INDORSEMENTS.

CHECKS are made payable to order or bearer, and in many cases change ownership several times before reaching the payee bank. Various questions have arisen concerning them. As the former chapter was devoted to checks having forged signatures, or those which, having correct signatures, are altered by raising the amount or in other ways, the continuity of our work will be best preserved by stating in the first part of the present chapter the law relating to forged indorsements.

§ 206. **Must pay on genuine indorsement of payee.** "When a bill or check is payable to order to justify the application to its payment of the funds of the drawer it must be proved that the required order was in fact given—in other words, it must be proved that the indorsement was genuine—and the burden of this proof rests upon the person or bank upon whom the bill or check is drawn. Where the indorsement of the payee is shown to be forged, the payment of a check by the bank is in its own wrong and can never be set up as a defence against the person whose rights it violated or whose funds are misapplied. In all such cases the bank must be liable to some person to the extent of such wrongful payment. If the check at the time was the property of the payee it is to him that the bank is liable; but if it had never passed into his hands, and he had no interest whatever, they are the funds of the drawer that have been misapplied, and which the bank is bound to replace."<sup>1</sup>

<sup>1</sup> Paine, J., *Morgan v. Bank*, 1 Duer, p. 438; Aff. by 11 N. Y. 404. "It is well settled that a forged indorsement does not pass a title to commercial paper negotiable only by indorsement, and does not justify the payment of

§ 207. **Payment to person of same name as real payee.** Moreover, if a person bearing the same name as the payee of a check indorse and transfer it knowing that he is not the person intended as the payee, this is a forgery.<sup>1</sup> Judge Ashurst in *Meade v. Young*<sup>2</sup> said: "In order to derive a legal title to a bill of exchange it is necessary to prove the handwriting of the payee, and therefore though the bill may come by mistake into the hands of another person though of the same name with the payee yet his indorsement will not confer a title." In Indiana a pension agent sent a check on a bank to a pensioner by mail, but addressed it by mistake to the wrong post-office. The check, consequently, was received by another person of the same name who forged an indorsement thereon, sold the check, and received the money. The pensioner sued the bank and recovered.<sup>3</sup>

§ 208. **Canal Bank v. Bank of Albany.**<sup>4</sup> Of all the cases decided none has been so often approved as this. The Bank of Albany received a draft payable to B.'s order through several successive indorsements, B.'s name appearing first. As agents of the immediate indorser, but without disclosing its agency, the bank presented it to the Canal Bank which paid the same. Subsequently, it ascertained that B.'s name was a forgery, and having notified the Bank of Albany of this fact sued to recover the money paid. The court decided

such paper." *Comstock, J., Graves v. American Ex. Bank*, 17 N. Y. p. 208; *Talbot v. Bank of Rochester*, 1 Hill, 295; *Canal Bank v. Bank of Albany*, Id. 287; *Welsh v. German American Bank*, 73 N. Y. 424; *Coggill v. American Ex. Bank*, 1 Id. 113.

<sup>1</sup> *Graves v. American Ex. Bank*, 17 N. Y. 205.

<sup>2</sup> 4 Term, 28.

<sup>3</sup> *Indiana Nat. Bank v. Holtsclaw*, 98 Ind. 85. In this case the bank contended that the plaintiff had no title and could not maintain his suit; in other words, in consequence of the mistake in the address that no title vested in the plaintiff. But the court said: "This by no means follows. The title vested upon the acceptance of the check. If deposited as directed the acceptance was then made and the title vested; if not deposited as directed still the check notwithstanding such misdirection might be accepted, and when accepted the title vested."

<sup>4</sup> 1 Hill, 287.

that though it had been innocent of intended wrong, yet having obtained money of the Canal Bank on an instrument with an imperfect title, must refund the amount. Moreover, it was required to do this notwithstanding the delay of more than two months in giving notice of the forgery, after the Bank of Albany had received the money and transmitted the same to its principal. In the way of further elucidation of the subject the following principles were announced in that case.

(a) *Only payee has title.* Only the payee can assert a title to a bill or note payable to order, without his indorsement.

(b) *Acceptor cannot dispute drawer's signature.* If one accept a draft in the hands of a *bona fide* holder, he will not be allowed afterward to dispute the genuineness of the drawer's signature, though he may that of the indorsers, and payment operates in this respect the same as on acceptance.

(c) *Lapse of time does not affect drawee's remedy.* When a drawee of a draft has paid it to an innocent holder on the faith of a forged indorsement mere lapse of time, however long, between the payment and notice of the forgery will not deprive him of his remedy, provided he has incurred no unreasonable delay after discovering the forgery.

(d) *Rights of successive indorsers.* When several successive indorsers have advanced money on a draft payable to order and it turns out that neither had a title because the first indorsement was a forgery, each may recover from his immediate indorser.

(e) *Bank acting as agent when liable as principal.* A bank to which a draft is indorsed and which transacts the business without disclosing its agency, may be regarded and charged as principal by those with whom it thus deals. And it will be no answer that it is the uniform custom of banks to transact such business without disclosing their agency.<sup>1</sup>

<sup>1</sup> In another often-quoted case T. was the owner of a certificate of deposit issued by the bank of L. payable to order which he indorsed with the direction that it should be paid to W. & Co., and then transmitted it to them by



(f) *Star Fire Insurance Company's case.* An interesting case has been determined in New Hampshire.<sup>1</sup> An insurance company drew a draft on its manager payable to M. and G. to settle a claim occasioned by a loss from fire. The draft was sent to the company's local agent, Craig, with the direction to deliver it to the claimants. Instead of doing so he indorsed it in his own name, forged theirs, and presented it to a bank for payment, which paid him the amount. The bank sent the draft in the usual course of business to the insurance company which paid it; but, afterward, learning what its local agent had done, it paid M. and G. the amount of their claim and then sued the bank to recover the amount of the draft. Judge Allen said: "The defendants received the draft on a forged indorsement of the payees' names and took no title to it. By indorsing it they warranted the genuineness of all prior signatures.<sup>2</sup> The defendants' indorsement was a representation that they had paid or accounted, or would pay and account, to the payees for what they might receive upon it. Relying upon their indorsement and the representations which it legally carried, the plaintiffs paid the draft, and the defendants received the money or an equivalent credit, through their correspondents who collected it. With knowledge or notice of the forgery the plaintiffs might have resisted payment. They had no knowledge or notice or

mail though without their knowledge or request. It never reached them, but was stolen on the way, their names were forged thereon, after which it came into the possession of the Bank of Rochester in the ordinary course of business. The bank collected the money supposing it was the owner, but was obliged to repay it to T. The bank of L. was negligent in not apprising the other bank of the forgery after the payment of the certificate, nevertheless this was no defence to T.'s claim against the Bank of Rochester. Talbot v. Bank of Rochester, 1 Hill, 295. A recovery in such a case by T. and satisfaction of the judgment would transfer the property in the certificate to the Bank of Rochester.

<sup>1</sup> *Star Fire Insurance Co. v. New Hampshire Nat. Bank*, 60 N. H. 442.

<sup>2</sup> *State Bank v. Fearing*, 16 Pick. 533; *Lobdell v. Baker*, 1 Met. 193; *Cabot Bank v. Morton*, 4 Gray, 156; *Merriam v. Wolcott*, 3 Allen, 258; *Herrick v. Whitney*, 15 Johns. 240; *Murray v. Judah*, 6 Cow. 284; *Canal Bank v. Bank*, 1 Hill, 287; *Aldrich v. Jackson*, 5 R. I. 218; *Thyral v. Newell*, 19 Vt. 202.

even suspicion of the character of the first indorsement, and were in no fault for not knowing it. They had a right to rely on the defendants' indorsement; and with that reliance they paid the draft, and the defendants received the money paid through an innocent mistake. By reason of the forgery the payees failed to receive the money due them, and the plaintiffs were compelled to pay again the amount of the draft, and might then rely on the promise of the defendants arising from their indorsement for repayment.

"The defendants having credited the amount of the draft to Craig and indorsed it for collection must be understood to have received the draft as cash, and were holders for value. If they received it as agents for collection, they did not disclose the agency; and as between them and the plaintiffs, they must be taken to have acted as principals.<sup>1</sup> The banks at Boston and Hartford subsequently indorsing the draft for collection were agents of the defendants,<sup>2</sup> and the defendants were the proper parties to be sued. Craig was not an agent of the plaintiffs for any purpose connected with the draft, except to deliver it to the payees. . . His acts not being within the duties of his agency, and being unauthorized, did not bind the plaintiffs, and his knowledge of the forgery was not the knowledge of the plaintiffs. The plaintiffs notified the defendants of the mistake in payment as soon as the forgery was discovered, and being in no fault for not knowing it sooner, there was no unreasonable delay in the notice to the defendants.<sup>3</sup> This is not the case of a drawee paying a draft on which the name of a drawer is forged, or which was put into circulation by the drawer with a forged indorsement upon it. In such a case the drawee having ordinarily the best means of knowledge of the drawer's signature, cannot recover from an innocent holder to whom he has paid the draft.<sup>4</sup> An acceptance of the draft warrants

<sup>1</sup> Canal Bank v. Bank, 1 Hill, 287.      <sup>2</sup> Hoover v. Wise, 91 U. S. 308.

<sup>3</sup> Canal Bank v. Bank, *supra*; Merchants' Nat. Bank v. National Eagle Bank, 101 Mass. 281.

<sup>4</sup> Hortsman v. Henshaw, 11 How. 177; Coghill v. American Exchange Bank, 1 N. Y. 113.

the genuineness of the drawer's signature, but not of an indorser's made subsequent to the issuing of the draft and before acceptance or payment; and the payment by the drawee to one who holds by a forged indorsement of the payee's name entitles him to recover the sum paid, if seasonable notice of the forgery is given.

"The defendants and plaintiffs both paid the draft by mistake, neither knowing nor suspecting the forgery. If there were any question of negligence, the defendants preceded the plaintiffs, who relied on the former's indorsement, which carried with it assurance of the genuineness of the preceding indorsements. The equities between the parties are not equal.<sup>1</sup> The defendants have received the plaintiffs' money, which in equity and good conscience they cannot retain, and the plaintiffs made a reasonable demand for it before suit."

§ 209. **Indorsement a warranty of genuineness.** An indorsement of negotiable paper is a warranty by the indorser to every subsequent holder in good faith, that the instrument itself and all the signatures antecedent to his indorsement are genuine; and when these are forgeries the indorser is liable on his warrant to his subsequent holder without presentation for payment or notice of non-payment. Thus A. obtained a check drawn by B. payable to C. & D. Having made a purchase of S. & Co. they took the check from A. in payment giving him their check for the balance which they intended to make payable to C. & D., the payees of the other, but by mistake wrote the names of C. & E. This firm had no existence. A. had this check certified, and forging the indorsement of C. & E. offered it to D. for clothes. D. on learning from S. & Co. that the check was genuine indorsed his own name on the back and took it to his bank for deposit. The bank would not receive it because no satisfactory information was given about the payees C. & E. and advised D. not to take it. Following the bank's advice D. declined to take the

<sup>1</sup> McKleroy v. Southern Bank, 14 La. Ann. 458.

check, though having indorsed his name thereon, and A. afterward passed it to L. for value. In an action against D., to recover the amount he was declared liable without presenting the check for payment or notice of non-payment to him.<sup>1</sup>

§ 210. **Identification.** (a) *Drawee liable for mistake.* Nor is the duty of the drawee when accepting a check to pay the same only on the genuine indorsement of the payee affected by the custom among bankers of ascertaining the identity of the person indorsing the name of the payee and receiving payment. If the drawee relies on false representations of identity for which neither the drawer nor the payee is responsible he pays to the wrong person at his peril.<sup>2</sup>

(b) *Proof in case of wrong payment to intended person.* Moreover, when the drawee attempts to justify payment to a person not bearing the name of the payee on his unauthorized indorsement of the payee's name, by showing that he was the person whom the drawer intended to pay, though described by a false name, he cannot be permitted to prove some of the facts pertaining to the drawing the check and to exclude others which tended to disprove such intention.<sup>3</sup>

<sup>1</sup> *Turnbull v. Bowyer*, 40 N. Y. 456. The indorsement of a raised check is in effect a representation and warranty to the drawee that it is genuine on which he may rely in making payment. *City Bank v. First Nat. Bank*, 45 Texas, 203. And the difference between the amount of the original check and the raised amount, paid to an indorser through mistake, may be recovered by the paying bank, *Id.*

<sup>2</sup> *Dodge v. National Ex. Bank*, 30 Ohio St. 1.

<sup>3</sup> *Dodge v. National Ex. Bank*, 30 Id. 1; S. C., 20 Id. 234, tried a second time. In this well-known case the drawer of a check payable to the order of Dodge delivered it to a third person in exchange for property, supposing that he was Dodge himself. The receiver claimed to be Dodge, and said that he could identify himself at the bank. In ignorance of the circumstances under which the check was given, the bank without inquiry paid the check to the bearer on the forged indorsement of the plaintiff's name. In a suit by Dodge against the bank it was held, (1) That he could ratify the act of the drawer in giving the check, and by such ratification the check would become his property, for the amount of which he could maintain an action against the bank. (2) The fact that the drawer, with notice of Dodge's claim against

(c) *Reliance for identification by final payee on prior payee.* A certificate of deposit payable to the order of C. the depositor, on return of the same, was issued by bank A. The bank took the mark of the depositor, who could not write, on its signature book and wrote a description of him opposite. Shortly afterward the certificate was stolen from C., and presented to bank B. by a stranger, who gave C.'s name and said that he could not write. The cashier of bank B. accordingly indorsed the certificate to his own order with C.'s name to which the stranger made his mark, and an employé of the bank added his signature as "witness to mark." The cashier then indorsed the certificate and sent it through a correspondent to bank A. which paid it, and in due time the money was given to the stranger. Not long afterward the real depositor, C., appeared at the bank where he deposited his money, and demanded payment. The bank, acknowledging the forgery, paid him, and then brought a suit against bank B., to recover payment on the forged indorsement. It was held that bank A. had a right to rely on the identification of the real depositor by the other bank and could therefore recover.<sup>1</sup>

§ 211. **Bank not required to know intermediate indorsers.** Although a bank cannot charge a forged check to the account of the drawer, it is not required to know the persons who indorse a check drawn thereon except the presentor for payment. Nor is it authorized to withhold payment until furnished with direct proof that the signatures of the indorsers preceding the presentor's are genuine. In cases of this kind the bank must know that the signatures of the drawer and of the presentor are genuine, but if an intermediate signature is a forgery, the bank cannot be required to pay again.<sup>2</sup>

the bank was subsequently charged with the amount of the check in settling with the bank, did not affect Dodge's rights against the institution.

<sup>1</sup> State Nat. Bank v. Freedmen's Sav. & Trust Co., 2 Dill. 11.

<sup>2</sup> Levy v. Bank of America, 24 La. Ann. 220; Smith v. Mechanics' Bank, 6 Id. 610.

§ 212. **Liability in Louisiana on forged indorsement.** A bank is liable to the payee of a check made payable to his order, if the same should be paid on the forged indorsement of the payee's collector. Judge Cole, speaking for the court, said, "A depositor in a bank has the right to suppose that the bank will only pay out his money upon his own signature or that of his agent, and upon the conditions specified in the check. The party receiving a check drawn by a depositor is actuated by this confidence and belief, and takes a check with the understanding that it shall be paid only to his order or as specified in the check. . . The banks having consented to pay the deposits of their depositors on their checks have thus tacitly agreed to pay them to the payees, and they are bound to know that the checks are paid to the real payees or their agents, as long as they permit their depositors thus to draw checks and thus to make payments to their creditors. Otherwise creditors would be liable to be defrauded. . . The bank holds the money of its depositors, subject to be checked for, as their agent. When, then, the bank receives a check instructing them to pay a certain part of the deposit of the drawer to a third party, and the bank agrees so to do by its general custom, and by undertaking to pay it upon the supposed indorsement of the third party, the amount of the money represented by the check, and on deposit as that of the drawer, becomes *eo instanti* the property of the payee, and the bank, from the moment it undertakes so to pay the check; holds the amount of the check as the agent of the payee, and is responsible to the payee, as his agent, if he pays it upon a forged indorsement."<sup>1</sup>

§ 213. **Payment of check obtained by forging indorsement on draft.** If a check be obtained from the drawee of a draft by forging an indorsement thereon and which is payable to the forger, though this be not his correct name, and he indorses the check in the name written therein and passes it to a third person for a consideration, who receives the money from the

<sup>1</sup> Vanbibber v. Bank, 14 La. Ann. 481.

drawee bank, it cannot be recovered of the payee. Nor would he be negligent in such a case if he did not inquire concerning the indorsement since it would be made by the very person to whom the check was given and to whom the maker intended the bank should pay. The maker would be mistaken in the name of the person, but not in the person himself to whom he desired to make payment.<sup>1</sup>

§ 214. **Recovery by government on forged indorsement.** The right of the national government to recover money paid on a treasury check under a forged indorsement is conditioned on promptness in giving notice to the person to whom the check was paid. The government is subject to the same rules that control individuals in negotiating and paying commercial paper, and, as Daniel says, between them it "is undoubtedly necessary that the maker, acceptor, or other party who demands restitution of money paid under a forged indorsement or under a forged signature of the drawer of a bill should make the demand without unreasonable delay."<sup>2</sup>

§ 215. **Diligence in giving notice of forgery.** In giving notice to indorsers of forgery after its discovery, only reasonable diligence need be exercised to hold them liable. The Supreme Court of Illinois<sup>3</sup> in declaring this rule quotes from the case more frequently cited in this country than any other, "where each party enjoys only the same chance of knowledge (of the handwriting forged) no case demands anything more than reasonable diligence in giving notice after a discovery of the forgery."<sup>4</sup>

§ 216. **Transfers without indorsement.** Passing to indorsements which are legal it may be remarked that a check pay-

<sup>1</sup> *American Ex. Bank v. City Bank*, N. Y. Ct. Com. Pleas, 5 Legal Obs. 18.

<sup>2</sup> Daniel, Neg. Inst. § 1371; *Cooke v. United States*, 91 U. S. 389; *United States v. Clinton Nat. Bank*, 28 Fed. Rep. 357. See *United States v. Central Nat. Bank*, 6 Id. 134.

<sup>3</sup> *Schroeder v. Harvey*, 75 Ill. 638; *Bank of Commerce v. Union Bank*, 3 N. Y. 230. See also *Simms v. Clark*, 11 Ill. 137; *Magee v. Carmack*, 13 Id. 289; *Union Nat. Bank v. Baldeuwick*, 45 Id. 375.

<sup>4</sup> *Canal Bank v. Bank of Albany*, 1 Hill, 287.

able to order may be transferred by the payee orally with manual delivery without indorsement. The transferee, however, acquires only the rights he would have had if the check had been originally non-negotiable, in other words, the right which the payee had at the time of the transfer.<sup>1</sup>

§ 217. **Title to stolen and lost checks.** (a) *When holder gets a good title.* A *bona fide* holder of commercial paper, transferable by delivery, acquires a good title even from a thief or finder.<sup>2</sup> This was decided long ago in *Grant v. Vaughn*.<sup>3</sup> The defendant, a London merchant, gave a cash-note on his banker to Bicknell, who lost it. Lord Mansfield said: "In this case Bicknell himself might undoubtedly have brought this action. He lost it, and it came *bona fide* and in the course of trade into the hands of the present plaintiff who paid a full and fair consideration for it. Bicknell and the plaintiff are both innocent." The loss therefore fell on Bicknell, and the bearer recovered.

(b) *How affected if check be overdue.* But if a lost check be taken when overdue the maker can attack the holder's title. This exception was made by the Court of King's Bench, Bayley, J., saying: "If a bill, note or check be taken after it is due the party taking it can have no better title to it than the party from whom he takes it, and, therefore, cannot recover upon it if it turns out that it has been previously lost or stolen. Now a check is intended for immediate payment, and not for circulation. It is the duty of the person who receives it to present it for payment on the same or the following day, and if he neglects to do so and the parties upon whom it is drawn should become bankrupts in the mean time he must bear the loss. Here the check was drawn on the 16th of November, it ought, therefore, in due course to have been

<sup>1</sup> *Freund v. Importers & Traders' Nat. Bank*, 76 N. Y. 352. See § 61.

<sup>2</sup> If a check is made payable to the drawer without the words order or bearer and indorsed in blank and stolen and on presentation to the bank is paid it is protected, *Bowden v. National Bank, Hamilton Co. Dis. Ct. Ohio*, 7 Bull. 283.

<sup>3</sup> 3 Burr. 1516.



presented for payment on the 17th, and the defendant took it on the 22d. This is, therefore, just like the case of a bill taken after it is due and the party taking it has no better title than the person from whom he took it, and cannot recover upon it."<sup>1</sup>

(c) *This is a questionable circumstance.* The same court, though, in a later case receded somewhat from this doctrine, Littledale, J., saying: "It has been urged as matter of law that a party taking a check overdue has it with the same title and no other, as the person from whom he receives it. But although the rule of law certainly is so with respect to bills of exchange and promissory notes, I think it cannot be applied to checks." Hence in this case the real question was declared to be whether the defendant had acted *bona fide* and with due caution in taking checks six days after their date. Lord Tenterden, C. J., remarked that the taking of them "six days after they bore date from a person who had not given value for them . . . was indeed a circumstance to be taken into consideration by the jury in determining whether the defendants had taken the checks under circumstances which ought to have excited the suspicions of prudent men."<sup>2</sup>

(d) *Can loser demand new check.* The non-payment and probable loss of a check delivered by the maker to B. are not a consideration to support a promise to give a new check for the amount to C., to whom it was alleged that B. had sent the lost check.<sup>3</sup>

§ 218. **Indorsement to identify holder.** Sometimes the sole object of indorsing a check is to identify the holder. When this is proved he cannot be held as an indorser. Thus in

<sup>1</sup> Down v. Halling, 4 Barn. & Cr. 330.

<sup>2</sup> Rothschild v. Corney, 9 Barn. & Cr. 388.

<sup>3</sup> Johns v. Mason, 9 Hare, 29; S. C., 20 L. J. Ch. 305. If the check of a public officer be more than a year old, and would not be paid if presented, the Court of Chancery will order the issue of a new one. Taylor v. Scrivens, 1 Beav. 571. See practice for procuring a check when one is lost, Rhodes v. Morse, 14 Jur. 800; and the giving of a bond of indemnity for a new one, King v. Zimmerman, L. R. 6, C. P. 466; Hopkins v. Adams, 20 Vt. 407.

Louisiana the indorser of a check indorsed it for no other purpose than to identify the person who presented it to the bank and who was in the habit of collecting for the parties to whose order the check was drawn; the responsibility of the indorser, it was declared, related to the identity of the collector, but not to his authority to sign the check for the parties to whose order it was given. The question in such a case is for what purpose did the indorser bind himself. "For as he bound himself, so will he be bound."<sup>1</sup>

§ 219. **Legal intendment of second indorser.** A check was drawn by W., payable to the order of L., the plaintiff, and indorsed by P., the defendant. L. afterward indorsed the check and passed it, but in the end paid it in consequence of the failure of the maker to do so. The defendant did not indorse the check to give the maker credit with the plaintiff, and did not intend or agree to become liable to him on the check except as second indorser, and consequently was not liable thereon. Said the court: "Under such circumstances the legal intendment is that the indorser only intended to become liable as a second indorser and subsequent to the payee; and that he indorsed the paper with the understanding that the payee was to be the first indorser. Aside from the paper itself there must be extrinsic evidence that the indorsement was given with the intent of the indorser to give the maker of the note credit with the payee, so that the payee would have a right to indorse his name without recourse."<sup>2</sup>

§ 220. **Indorsement for collection.** "The reception from customers of checks on other banks is of frequent and daily occurrence in the business of banking, practiced because of its convenience. In such case an indorsement of the check for the special purpose of collection is not an indorsement *animo indorsandi*, and does not pass the title of the payee."<sup>3</sup> Usually the words "for collection" are used. These are a warning

<sup>1</sup> Commercial Press v. Cresson City Nat. Bank, 26 La. Ann. 744.

<sup>2</sup> Lester v. Paine, 39 Barb. 616, p. 620.

<sup>3</sup> National Com. Bank v. Miller, 77 Ala. 168.

to those who receive the check that its ownership has not been transferred.<sup>1</sup>

§ 221. **Indorsement of a lunatic.** The indorsement of a certificate of deposit by an insane person in whose favor it is drawn, obtained by fraud, carries no title, even to an innocent purchaser. "How far the contract of a lunatic," said Judge Brewer, "not as yet under guardianship can be enforced may not be clearly settled. When full consideration has been given, and the contract made in good faith, the mental infirmity has often been disregarded, and the contract enforced. Yet obviously, on principle, any promise of such a person lacks the essential element of a contract, to wit, assent." In the case which called for the application of this principle, the bank which purchased the certificate was innocent, but the seller was not; he obtained the indorsement of the original payee by fraud and deception, who received no consideration therefor. "Does the bank," continued Judge Brewer, "as a *bona fide* purchaser, occupy any better position than the wrong-doer from whom it purchased? Doubtless it is entitled to all the protection given to such a purchaser of negotiable paper; but such protection does not extend to an indorsement like this. There was no valid contract of indorsement created by defendant's signature on the back of the paper. It was no better than a signature written in a state of somnambulism, or even than a forgery. No negligence is imputable, for one who is incapable of prudence cannot be guilty of negligence; nor can there be an estoppel. He who is legally disabled to act cannot be estopped from denying that he has acted. An estoppel creates no power; and while in favor of a *bona fide* purchaser inquiry is denied as to equities between prior parties, yet such protection does not cut off inquiry into the contractual capacity of those parties. Such at least is the better doctrine, although it must be conceded

<sup>1</sup> *Sweeny v. Easter*, 1 Wall. 166; *First Nat. Bank v. First Nat. Bank*, 76 Ind. p. 567. This point has been frequently decided, see § 384.

that there are authorities to the contrary, especially in the English courts."<sup>1</sup>

§ 222. **Indorser's liability after notice.** "The indorser of a check may be holden on proper notice after payment has been refused by the drawee, upon a legal demand or any state of facts which amounts to a dishonor of the same."<sup>2</sup> E. made a loan to J. H. receiving therefor the latter's check which was made payable to the order of F. H. Before getting the money, J. H. requested his son Frank to indorse the check, which he did, putting over the same at E.'s request, the words "waiving demand and notice." E. retained the check more than a year before presenting it to the bank, in the mean time the maker had withdrawn his funds and failed. To sustain a suit on this check against the indorser notice to the former and also to the maker that the check had been presented to the bank and refused, was declared to be unnecessary, nor could demand before bringing suit be required by either.<sup>3</sup> An indorser who waives demand and notice is not entitled to any demand on the maker and notice of non-payment.<sup>4</sup>

§ 223. **Dishonored check taken by indorser.** A dishonored check, which is taken by the indorser with notice of the dishonor, is subject to every defence legal or equitable that could have been set up against himself.<sup>5</sup>

<sup>1</sup> *Anglo-California Bank v. Ames*, 27 Fed. Rep. 727; see *Wirebach v. First Nat. Bank*, 97 Pa. 543.

<sup>2</sup> *Foster v. Paulk*, 41 Me. p. 428; *Heylyn v. Adamson*, 2 Burr. 669; *Rushton v. Aspinall*, Doug. 679. The initials of the name of the holder of a bank check, indorsed thereon, are enough to charge him as an indorser, *Merchants' Bank v. Spicer*, 6 Wend. 443.

<sup>3</sup> *Emery v. Hobson*, 62 Me. 578.

<sup>4</sup> *Id.*; *Woodman v. Thurston*, 8 Cush. 157.

<sup>5</sup> *Anderson v. Busteed*, 5 Duer, 485.

## CHAPTER VII.

## PAYMENT OF CERTIFIED CHECKS.

§ 224. **Certifying equivalent to acceptance.** In an important case before the United States Supreme Court, Judge Swayne remarked that, "the certificate of the bank that a check is good is equivalent to acceptance. It implies that the check is drawn upon sufficient funds in the hands of the drawee, that they have been set apart for its satisfaction, and that they shall be so applied whenever the check is presented for payment. It is an undertaking that the check is good and shall continue good and this agreement is as binding on the bank as its notes of circulation, a certificate of deposit payable to the order of the depositor, or any other obligation it can assume. The object of certifying a check, as regards both parties, is to enable the holder to use it as money. The transferee takes it with the same readiness and sense of security that he would take the notes of the bank. It is available also to him for all the purposes of money. Thus it continues to perform its important functions, until in the course of business it goes back to the bank for the redemption and is extinguished by payment."<sup>1</sup>

(a) *Supreme Court of Illinois.* If the United States

<sup>1</sup> *Merchants' Bank v. State Bank*, 10 Wall. 604, p. 648. For good description of the purposes served by a certified check, see opinion of Denio, C. J., in *Farmers & Mech. Bank v. Butchers & Drovers' Bank*, 14 N. Y. p. 624. The liability of a bank on a certified check results from the nature of the contract, and not from usage or custom, *Cooke v. State Nat. Bank*, 52 N. Y. 96. "It is now well settled that certification is equivalent to acceptance and that a check certified stands upon the same footing as an accepted bill of exchange," *McGloin, J., Louisiana Ice Co. v. State Nat. Bank*, 1 McGloin, p. 180. "By the law merchant of this country the certificate of the bank that a check is good is equivalent to acceptance," *Merchants' Bank v. State Bank*, *supra*; *Helwege v. Hibernia Nat. Bank*, 28 La. Ann. 520.

Supreme Court have declared the object of certifying a check in broad language so have the courts in many States on numerous occasions. Says Judge Breese of the Supreme Court of Illinois: "There is really no distinction in the nature of the liability created between a certified check and a note of the bank payable on demand, as each is intended to circulate as money, each is an absolute promise to pay a specific sum on demand. The only difference between them is that the promise which is expressed in the bank note is implied in the check. They hold that the act of the bank officers in certifying a check is to appropriate the funds of the drawer in the bank to the credit of the check and a promise that upon demand they shall be applied to its payment. The object of getting a check certified is to enable the holder to use it as money; that is to pass it to others with the same certainty of its acceptance as affording the same security to a holder, and, by certifying, the bank meant to give the check a currency and value that would not otherwise belong to it, and this additional value can only be given to it by holding the certificate to be an unconditional promise of payment whenever payment shall be demanded."<sup>1</sup>

(b) *New York Court of Appeals.* In a case between two banks in New York<sup>2</sup> the Court of Appeals said that "when a check is presented for certification to a bank on which it is drawn the purpose is to ascertain with certainty what the bank alone can know, and that is whether the drawers of the check have funds sufficient to meet it; and, further, to obtain the engagement of the bank that those funds shall not be withdrawn from the bank by the drawees of the check. To this extent the knowledge of the bank must of necessity enable it safely to go in the way of assertion, and its own power over its own funds will suffice it to protect it as to its obligation."

<sup>1</sup> Bickford v. First Nat. Bank, 42 Ill. 238, p. 243; Barnett v. Smith, 30 N. H. 256.

<sup>2</sup> Marine Nat Bank v. National City Bank, 59 N. Y. 71.

(c) *Marine National Bank v. National City Bank*.<sup>1</sup> One of the banks, however, in that case contended that the certifying bank was bound to warrant not only the genuineness of the drawer's signature and the sufficiency of his credit, but also the genuineness of the check in all its parts including the specification of the amount to be paid and the names and identity of the payees. But the court answered that if this were so "then obviously there must occur an immediate and complete change in the modes of doing business, which would defeat and practically put an end to the use of certified checks. For no bank, under such a rule, could safely certify a check without, in the first instance, investigating its origin and history by inquiry of its makers and payees. The burden of such inquiries could not be borne without interfering with, or interrupting the other necessary business of the bank, and the practice of certifying checks would have to be abandoned, or a staff of inquirers instituted in every bank specially charged with these duties. It is plain that banks, in self-protection, would be compelled to refuse altogether to certify checks, and that this convenient and useful invention of modern business would come to an end. The mischief would arise from charging the banks with a knowledge that in the nature of things they cannot possess. With their responsibility limited to the fact within their knowledge, the practice imposes no burden upon banks, and subserves the convenience of commerce. No construction ought to be put on acts in the usual course of business which will impose upon the parties interested the necessity of immediately altering it. For, as the question is necessarily what did the parties mean, we cannot, without violent construction, attribute to them a meaning so burdensome that it will necessitate a change of the usual way of doing business."

(d) *Remarks on second trial*.<sup>2</sup> When the case was again before the court, Judge Allen said: "It is believed that banks

<sup>1</sup> 59 N. Y. 71.

<sup>2</sup> *Id.* p. 75.

do not always demand identification or proof of title in the person presenting a check for certification; and if they merely certify to the genuineness of the signature of the drawer and the sufficiency of the fund, the other matters can safely be left until payment is demanded. [The counsel for the defendant bank argued that] a bank must ascertain to a certainty before certifying that the check has not been altered or tampered with, and that the indorsements are genuine, that is, that the check is genuine in all its parts and that the apparent holder has a valid title. It is evident that to cast all this responsibility upon the certifying bank would put a stop to the certifying of checks except when presented by the drawer or under very peculiar circumstances."

§ 225. **Payment of check raised before certifying.** If a check be raised before certification the bank is not liable for the raised amount, and it can recover the same whenever payment has been made without negligence. Judge Earl, speaking for the highest court of New York, in a case of this kind, said that the bank in certifying "assumed a liability like that of an acceptor of a draft. By the certification it guaranteed the genuineness of the drawer's signature, and represented that it had funds of the drawer in its possession sufficient to meet the check, and it engaged that those funds should not be withdrawn from it by the drawer to the prejudice of any *bona fide* holder of the check; and the certification did not impose upon the defendant any further or greater responsibility. It did not import that the body of the check was genuine, or that the funds on deposit with it were absolutely applicable to the payment of the precise check certified. When, therefore, a check has been raised by some person without authority before certification, the certifying bank cannot be called upon in consequence of its certification to pay the amount of the raised check; and when a bank has thus certified a raised check by mistake and subsequently pays the money thereon without any culpable negligence on its part, it can recover the amount thus paid as money paid



by mistake. . . And whether the forgery and alteration were made before or after acceptance will make no difference.”<sup>1</sup>

§ 226. **Payment of check raised after certifying.** Nor is the drawee bank responsible for a larger amount inserted after certification. And if by mistake it pays the *bona fide* holder of a certified check which has been raised after certification, it can recover the money unless the holder has suffered in consequence of the mistake. In a case between two New York banks it was contended that when the check, originally for fifty-six dollars, was certified by the drawee bank, the certification “made it an obligation of that bank; that when subsequently presented to the bank in its altered condition as a check for \$15,006 the bank was bound to know its own obligation, and to detect the forgery, and that the bank by recognizing it as genuine and acquiescing in the payment through the clearing house, precluded itself from afterward setting up its own mistake.”<sup>2</sup>

(a) *Opinion by Rapallo, J.* In reply to this Judge Rapallo said: “On general principles, mere negligence in making the mistake is not, as has been already shown, sufficient to preclude the party making it from demanding its correction. Such negligence does not give to the parties receiving the payment the right to retain what was not his due unless he has been misled and prejudiced by the mistake. If his loss had been incurred and become complete before the payment, he should not in justice be permitted to avail himself of the mistake of the other party to shift the loss upon the latter. To render it compulsory upon the courts to refuse a correction of the mistake the facts of the case must bring it within the accepted [rules above stated]. This, the facts of the present case fail to do. The essential element is wanting, that the body of the instrument as well as the certification was the work of the bank, and that, therefore, it was conclusively presumed to know, by a mere inspection of the

<sup>1</sup> *Clews v. Bank*, 89 N. Y. p. 421.

<sup>2</sup> *National Bank v. National Mech. Bank. Ass'n*, 55 N. Y. 211.

instrument, whether or not it had been altered. The bank was not bound to know the handwriting or genuineness of the filling up of the check. It was legally concluded only as to the signature of the drawer and its own certification. The rules of law in relation to the correction of mistakes of fact have been gradually growing more liberal and are moulded so as to do equity between the parties. The exceptions which have been established by authority and have been engrafted upon the commercial law it is not our purpose to disturb; but they should not be extended; unless a case is clearly brought within them the general principles should govern. No case has been cited, nor do I think any can be found, which holds that a payment by mistake, such as is shown in the present case, cannot be recovered back."

§ 227. **Effect of subsequent inquiry about certification.** (a) *Clews v. Bank.*<sup>1</sup> If the certifying officer be asked after a check has been certified whether the certification is good and he returns an affirmative answer, the bank is not responsible for more than the amount certified. A check was drawn in Chicago on a New York bank, payable to the order of D., who indorsed it over to G. In due time it was presented to the drawee bank and certified. Afterward, it was altered by raising the amount and changing the date and the payee, and was offered to C. in payment for bonds. He sent it by a messenger to the bank to find out if the certification was good. The teller replied "yes," and C. accepted the draft. Prior to this the bank had been notified that the draft had not reached the indorser G., and had been requested to stop payment. In an action by C. to recover the amount on the raised draft it was held that the bank was not estopped by the statement of the teller from denying its liability, that at the time the draft was presented to him the bank owed C. no duty of active diligence to protect him from the fraud which the holder of the check was trying to perpetrate on him. It was bound to act in good faith and not to do anything or say

<sup>1</sup> 89 N. Y. 418.

anything intentionally or carelessly which would mislead him or upon which he could properly rely in taking the check. "The inquiry was not," said the court, "whether the body of the check was good or whether that check was certified and was then in the same condition in which it was at the time of the certification; nor was the inquiry whether the check was good for the amount thereof, or whether the amount thereof would be paid. The attention of the teller was called to nothing but the certification. . . The simple inquiry was, whether the certification was good, and it went no further. Suppose the check had never been certified and the inquiry had then been whether the check was good and the teller had replied that it was, such an answer would in law only have implied that the name of the drawer was genuine, and that there were funds in the bank to meet the check; and the bank would not have been responsible for any alteration or forgery of the body of the check."

(b) *In the Espy case*<sup>1</sup> a check had been raised from \$26.50 to \$3920 and the name of the payee changed from H. to E. H. & Co., and was offered to them in payment for bonds and gold purchased by a stranger. They sent the check for information to the bank whose teller replied "it is good," or "it is all right." Having received the check and delivered the bonds and gold, they passed the check through the clearing house. The bank paid the check, but, on discovering the forgery, brought an action and recovered of E. H. & Co. the money paid. The court maintained the following among other propositions: First. When money is paid by mistake on a raised check, and neither party is in fault, it may be recovered on the ground of lack of consideration. Second. When a party to whom such check is offered sends it to the drawee bank for information, the law presumes that it has knowledge of the drawer's signature, and of the state of his account, and is responsible for its answer on these points. Third. Unless there is something in the terms in which in-

<sup>1</sup> *Espy v. Bank*, 18 Wall. 604.

formation is asked that points the attention of the bank-officer beyond these two matters, his response that the check is good will be limited to them and will not extend to the genuineness of the payee written therein or the amount.

(c) *Parke v. Rose*.<sup>1</sup> A depositor drew his check for an amount in favor of A. or bearer. A. presented the check to B. after the amount had been wrongfully raised to get it cashed. The latter presented it to the cashier after banking hours, who told him that it was good and would be paid when presented at the proper time. B. took the check, paying the money thereon, presented it the next day, and was paid. It proved to be a forgery, though neither B. nor the bank knew this. The bank sued B. and recovered. "If the plaintiffs," said the court, "had certified the check and afterwards paid it, before discovering it to be a raised and altered check, they could have recovered the money from the parties to whom it had been paid."

§ 228. **Bank not estopped from showing alteration.** When a certifying bank endeavors to recover the money paid on a raised check it is not estopped from showing the body of the check to be a forgery by the verbal assurance of the teller to the payee of the check that it is correct in every particular.<sup>2</sup> In a case requiring the application of this principle the court said: "It was no part of the teller's duty to give an assurance as to the genuineness of the check, except in respect to the signature of the drawers. If he went beyond this his representation did not bind the bank. Moreover, if the reply made to the question put to him [by the messenger who presented the check] was intended as an affirmation of the genuineness of the body of the check, it was simply an ex-

<sup>1</sup> 67 Ind. 500, p. 503.

<sup>2</sup> Proof cannot be offered to show that the word "certified" when used in certifying checks, by the custom and common understanding of banks and merchants is construed to import an obligation on the part of the certifying banks to pay the amount stated in the check notwithstanding the body of the check may be forged, *Security Bank v. National Bank*, 67 N. Y. 458.

pression of his opinion, and must have been so understood by the person who made the inquiry.”<sup>1</sup>

§ 229. **Verbal acceptance.** (a) *In New Hampshire.* Can a check be verbally accepted? The Supreme Court of New Hampshire, having in mind the verbal acceptance of drafts, and regarding checks as similar, had no hesitation in applying the law relating to the verbal acceptance of the former kind of instruments also to checks.<sup>2</sup>

(b) *Dangerous method.* But if the court had considered the dangers which were likely to arise from sanctioning such a loose method of doing business, the judges might have hesitated to add this to the long list of principles which have been applied to new kinds of business with the confident expectation of promoting the material and moral interests of society. The history of our jurisprudence clearly shows that it would have been better in many cases if new principles of law had been applied instead of stretching old ones to cover new conditions.

(c) *Opinion of United States Supreme Court.* The United States Supreme Court, on the other hand, regard with less favor a verbal acceptance or certification. The question arose in the *Espy* case.<sup>3</sup> The check, which was the occasion of that controversy, was taken by a messenger of *Espy, Heidelbach & Co.*, to the teller of the defendant bank, who said, “It is all right,” or “it is good.” The court first remarked that where the object of certifying was “to use the indorsement to put the check in circulation, or raise money on it, or use it as money, and this object is known to the certifying bank, it may be argued with some force that the bank should, as in the case of an acceptance of a bill of exchange, be held responsible for the validity of the check as it came from the hands of the certifying bank. Such a rule would seem to be just when checks are certified, as we know they often are,

<sup>1</sup> *Security Bank v. National Bank*, 67 N. Y. 458, the court citing *Bargett v. Orient Mutual Ins. Co.*, 3 Bosw. 385; *Higgins v. Moore*, 34 N. Y. 417; *Lawrence v. Maxwell*, 53 Id. 19; *Wheeler v. Newbould*, 16 Id. 392.

<sup>2</sup> *Barnett v. Smith*, 30 N. H. 256.

<sup>3</sup> 18 Wall. 604.

without reference to the presence of funds by the drawer and when the well-known purpose is to give the drawer a credit by enabling him to use the check as money by putting it in circulation."

(d) *Espy case*. But the verbal statement made in the Espy case did not come within that principle. "There was no design or intent on the part of the bank to assume a responsibility beyond the funds of the drawer in their hands, nor to enable the payee of the check to put it into circulation. Nothing was said or done by the bank-officer which could be transferred with the check as part of it when innocent taker of it from the payee. Such subsequent taker would have no right to rely on what was said by the bank-officers, any further than the payee would. We are of opinion that the court was entirely right in treating the case as one in which information was sought and obtained by Espy, Heidelberg & Co. for their own use, and to govern their own action. For such information as the bank was willing to give, and did give, it was, no doubt, responsible, because it had reason to believe that the other party would act upon it. But only to this extent and only on this principle is it liable. It is not liable as for accepting or indorsing a draft or check with intent that it might go upon the market for general use and negotiation with the credit of its name attached to the paper, just as it was placed on the market."

(e) *Opinion of Shepley, J.* The doctrine of the verbal acceptance of a check found favor in the mind of Judge Shepley of the United States Circuit Court. When the acceptor has funds of the drawer in his hands a verbal acceptance of a check, or a verbal promise to accept a check is not contrary to the Statute of Frauds, for the reason that the drawee's engagement is in fact to pay his own debt to the drawer, the owner of the funds. But he drew a sharp distinction between verbally accepting when the drawee had funds of the drawer, and when the drawee had none. A parol accommodation acceptance of a bank-check is invalid. "It is not perceived how any sound reason can be given why

verbal acceptance, or promise to accept, for the mere accommodation of the drawer without funds or value received, should not be treated as within the statute."<sup>1</sup>

(f) *Law in Illinois.* In Illinois, however, the highest court has announced that even a parol promise to accept an existing, though not present, check is binding, nor does the Statute of Frauds stand in the way of enforcing it.<sup>2</sup>

(g) *Not forbidden by national statute.* The Act of Congress<sup>3</sup> forbidding a national bank from certifying a check unless the drawer has a deposit equal to the amount specified in the check does not invalidate an oral acceptance of a check, or an oral promise to pay one, if the deposit be sufficient for that purpose. Nor does the act invalidate a conditional acceptance that a bank will pay a check whenever the drawer shall have sufficient funds to pay it.<sup>4</sup>

§ 230. **Import of "good" in certifying.** If the certifying consist in using the word "good," its legal import and effect are well understood. "Such a certificate has been held to be equivalent to an acceptance of a bill of exchange, and to be an admission simply of the genuineness of the signature of the drawer and that there are funds for its payment."<sup>5</sup>

(a) *Tennessee view. Duty of holder.* In Tennessee rather different views are held on the subject of certifying. In *Andrews v. German Nat. Bank*<sup>6</sup> it was decided that to render liable the drawer of a check which has been certified by a

<sup>1</sup> Shepley, J., *Morse v. Massachusetts Nat. Bank*, Holm. 209, p. 214.

<sup>2</sup> *Nelson v. First Nat. Bank*, 48 Ill. 36, p. 40.

<sup>3</sup> March 3, 1869.

<sup>4</sup> *National Bank v. National Bank*, 7 W. Va. 544.

<sup>5</sup> *Marine Nat. Bank v. National City Bank*, 59 N. Y. p. 77; *Farmers & Mechanics' Bank v. Butchers & Drovers' Bank*, 16 Id. 125; *Barnes v. Ontario Bank*, 19 Id. 152; *Meads v. Merchants' Bank*, 25 Id. 143; *Irving Bank v. Wetherald*, 36 Id. 335; *Merchants' Bank v. State Bank*, 10 Wall. 604; *Espy v. Bank*, 18 Id. 604. Marking a check "good" renders the bank liable to the holder, *Phoenix Bank v. Bank of America*, 1 N. Y. Leg. Obs. 26. "The certificate is a useless form unless it means, not merely that the check was good when certified, but that it will be good when presented for payment," *Oakley, C. J., Willitts v. Phoenix Bank*, 2 Duer, 121, p. 129.

<sup>6</sup> 9 Heisk. 211; *Schoolfield v. Moon*, 9 Id. 171.

bank as "good," the holder must present it for payment within the business hours of the next day after it is received.

(b) *Certified check as payment.* It is a question for the jury whether a check certified as "good" by the bank and taken in payment of a note or draft is an absolute or only a conditional discharge of the debt.

(c) *Liability of bank to holder.* As between the holder of a check certified "good" and the bank which certified it, the bank becomes liable as on acceptance, and it is as binding as its certificate of deposit or notes of circulation.

(d) *Application of the law of demand and notice.* The law of demand and notice has no application and the bank becomes so far the primary debtor that no delay in presenting at least not for a year or more, will affect its obligation, Nicholson, C. J., saying: "We have been referred to no authority, nor are we aware of any, in which it is held that the fact of certification of a check either discharges the drawer absolutely from liability to the holder, or changes the law of demand and notice which governs the relation between the holder and drawer. . . It is no doubt true that the credit of the check may rest mainly on the fact that the bank is primarily liable, but it is made stronger by the fact that the drawer stands as surety for the bank. . . It is still a check and because of its certification and thereby of the bank's promise to pay it, its approximation to money and its negotiability in market are increased."<sup>1</sup>

§ 231. **Authority of cashier to certify.** "The cashier has a right by virtue of his office to make this certificate when the drawer has funds. He is the custodian of the funds of the bank and of the books; he receives money and gives vouchers therefor, and whether upon receiving a check he pays it in money or gives the holder a certificate of deposit or draft, or a certificate that he will retain sufficient of the money standing to the drawer's credit to pay it when presented, he is in either case acting within the line of his duty and within the

<sup>1</sup> Andrews v. German Nat. Bank, 9 Heisk. pp. 218, 220, 221.



scope of the authority which necessarily attaches to his office."<sup>1</sup>

(a) *If drawer have no funds bank must pay.* But he has no right to make a certificate when the drawer is without funds. If, however, he should do so, the holder could insist on payment of the check as though the drawer had money in the bank. It could not plead want of authority in a suit by an innocent holder of such a check. "The bank having placed the cashier in the position which implies this inherent authority, those who deal with the bank have a right to infer that he possesses it, and although the exercise of it in a given case may not be warranted on account of the existence or non-existence of some extrinsic fact peculiarly within his official knowledge, yet the bank is responsible instead of an innocent party upon every principle of reason and morality."<sup>2</sup>

(b) *Extent of rule.* The same rule prevails in several States. And in a suit by a *bona fide* holder of a certified check against the bank, the authority of its assistant teller to certify checks as "good," may be shown by evidence of a course of dealing as between himself, his principals and the bank customers. But such authority cannot be shown by evidence of a general custom of banks to authorize such agents to pledge the credit of the bank by certifying checks.<sup>3</sup>

(c) *If check be unusual cashier cannot certify.* If a check is not drawn in the usual course of business, for example, if it contain the recital, "To hold as collateral for 1000 P. T. Oil pipage paid," the cashier has no authority to certify, nor can he render the bank responsible therefor by ratifying it.<sup>4</sup>

<sup>1</sup> Church, C. J., *Cooke v. State Nat. Bank*, 52 N. Y. p. 114.      <sup>2</sup> *Id.* p. 115.

<sup>3</sup> *Hill v. Nation Trust Co.*, 108 Pa. 1; *French v. Irwin*, 4 Baxter, 401. "The certificate of the cashier of a bank that a check is 'good' is a representation of a present existing fact within his knowledge as cashier, and if that certificate be made by him in the course of his ordinary business as cashier, it will bind the bank in favor of innocent third persons upon the principle of *estoppel in pais* even if the certificate be not true and the drawer of the check has no funds on deposit in the bank," *Shepley, J., Morse v. Massachusetts Nat. Bank*, Holm. 209, p. 211.

<sup>4</sup> *Dorsey v. Abrams*, 85 Pa. 299.

(d) *Must not be post-dated.* Not only must the depositor have a requisite deposit before the cashier can legally certify, but the check must not be post-dated at the time of certifying. When a post-dated check is certified before maturity this is declared to be a notice to the world that the cashier is not acting within his authority, and the bank cannot be required to pay it.<sup>1</sup>

(e) *Chester's case.*<sup>2</sup> In February, 1866, B. drew his check dated March 1, 1866, on the defendant doing business at L. On the face was written, "Accepted, A. J. Chester, A. Cash." C., who wrote it, had been appointed assistant cashier by the defendant bank for the special purpose of signing circulating notes. He therefore had no authority for doing the act; furthermore, B. had no money on deposit. The check was put in circulation in February, and cashed by Pope in New York, March 2d, without any notice of defects save those appearing on the face of the instrument. In an action on the check it was held that in the absence of prior practice or usage the acceptance could not bind the bank, even in favor of a *bona fide* holder, that Pope could not thus be regarded, as the acceptance was not in the common form used by banks to indicate funds on deposit to the amount of a check, and, furthermore, that it appeared to be by a subordinate officer whose authority must be shown, and that the check, if accepted at date, could not have reached New York in the ordinary course of mail at the time it was cashed, which facts were sufficient to put Pope on inquiry. On the question of authority the court said: "Where there is no authority for the act called in question, a general or particular usage in a given direction will not bind the bank to respond to a third party who deals with it in good faith. In the present case neither authority or usage is proved . . . to sustain the act of Chester, but the fact is just the contrary. Perhaps we might assume that a cashier by virtue of his general authority, in the absence of proof of any restriction upon it, could

<sup>1</sup> 1 Clarke Nat. Bank v. Bank of Albion, 52 Barb. 592.

<sup>2</sup> Pope v. Bank of Albion, 57 N. Y. 126; Rev. 59 Barb. 226.

certify that the check of a customer was good, and thus bind the bank in favor of a *bona fide* holder whether at the time the customer had funds or not.<sup>1</sup> And it may be that the general usage of banks would require us to hold in the same way where we have the proof that in this respect this power of the cashier has been specially restricted, and that no such usage had ever been practised by any of the officers of the bank. In the case of a subordinate officer or clerk it may be affirmed, as a general rule, that his authority for any act out of the mere ordinary routine of banking business must be shown in order to bind the bank.<sup>2</sup> Where a subordinate officer or clerk has been permitted to pursue a particular practice in certifying checks for customers or otherwise, his acts although wrongful will bind the bank in favor of a person who fulfils the conditions of a dealer in good faith. Being satisfied that the act of Chester was wholly without authority, and unsustained by any prior practice or usage, the plaintiff could not recover if he is to be regarded as a *bona fide* holder in all respects."

§ 232. **Limited authority of president to certify.** The president of a bank has no authority to certify his own checks drawn thereon. Nor will a by-law conferring authority on him to certify checks cover his own. "It is a necessary and universal implication in all cases of agency that the power conferred upon the agent is to be exercised for the exclusive benefit of the principal. It is repugnant to the very nature and essence of such power to hold that it may be used for the benefit of the agent in hostility to the interests of the principal. That a trustee or agent shall not act for his own benefit in any manner relating to his agency or trust, is an old and familiar doctrine of the court of equity, frequently asserted in the courts of this country and in England. The rule is applicable to all persons standing in a trust relation. The principal is entitled to the exercise in his behalf of all

<sup>1</sup> Wild v. Bank, 3 Mason, 505.

<sup>2</sup> Potter v. Merchants' Bank, 28 N. Y. 641.

the skill, industry, and ability of his agent, and to his intensest fidelity to his trusts."<sup>1</sup>

§ 233. **Must pay certified forged check.** If a bank certify a forged check it must pay the same.<sup>2</sup> ∴ The reason for this rule was long ago given by Chief Justice Holt. "Seeing somebody must be a loser by this deceit it is more reason that he that confides in the deceiver should be a loser than a stranger."<sup>3</sup> And if such a check be advertised, but this is not known to the holder, he is not prevented from recovering.<sup>4</sup> A bank is also liable to the *bona fide* holder of a certified check though obtained from the drawer by fraud and drawn to the order of a fictitious person, if indorsed to the holder by the person to whom the drawer intended that payment should be made.<sup>5</sup>

§ 234. **Payment of forged certificate.** So, if a check containing a forged certification is presented to the teller, whose certificate it purports to be, and he pronounces it genuine, the certification is adopted and the bank is bound by it as though it were genuine.<sup>6</sup> This was decided in a case in which C. & Co. delivered to R. gold, checks, and certificates receiving R.'s check on the plaintiff's bank which purported to be certified by the teller. C. & Co. immediately sent a messenger with the check to the plaintiff's bank, where, handing it to the teller, he asked if it was all right. On receiving an affirmative reply, C. & Co. took the check. The

<sup>1</sup> Smith, J., *Clafin v. Farmers & Mechanics' Bank*, 25 N. Y. p. 296; see also Judge Denio's opinion in *New York Central Ins. Co. v. National Protection Ins. Co.*, 14 N. Y. 85; Rev. 20 Barb. 468.

<sup>2</sup> *Farmers & Mechanics' Bank v. Butchers & Drovers' Bank*, 16 N. Y. 125; opinion of Denio, C. J., in the same case, 14 Id. 623; *Hagen v. Bowery Nat. Bank*, 64 Barb. 197; *Commercial & Farmers' Nat. Bank v. First Nat. Bank*, 30 Md. 11; *Louisiana Nat. Bank v. Citizens' Bank*, 28 La. Ann. 189.

<sup>3</sup> *Hern v. Nichols*, 1 Salk. 289.

<sup>4</sup> *Hagen v. Bowery Nat. Bank*, 64 Barb. 197; S. C., 6 Lans. 490; *Raphael v. Bank of England*, 17 C. B. 161.

<sup>5</sup> *Merchants' Loan & Trust Co. v. Bank*, 7 Daly, 137. A certified check without consideration to the drawer is subject to the equities of the bank against the payee, *Stevens v. Corn Ex. Bank*, 3 Hun, 147; S. C., 5 Th. & C. 283.

<sup>6</sup> *Continental Nat. Bank v. National Bank*, 50 N. Y. 575.

certification in truth was forged, and the certifying bank having declined to pay it, C. & Co. brought a suit against it and recovered.<sup>1</sup> And if the authority of the teller to certify is limited to the amount of funds of the drawer the bank will be liable if he violate his authority and certify to a larger amount to accommodate the drawer.

§ 235. **Direction not to pay certified check.** (*a*) *Opinion of Daniels, J.* As a bank is not liable on a certified check until after delivery, so if while having a certified check in its possession—drawn for the accommodation of the payee and which without his indorsement is presented to the drawee bank and certified—but which the maker directs the bank not to pay, it cannot be legally paid. If the bank should pay it the maker's account cannot be charged with the amount. "The evidence," in a case involving this principle, said Judge Daniels, who delivered the opinion of the court, "tended to show that the bank had merely certified but had not delivered its certificate, when it was prohibited from paying the check. The certificate, in that condition, imposed no obligation or liability on the bank for the payment of the amount to the holders. A delivery, as well as the making of the certificate, was necessary to render the defendants liable upon it. Until that took place the certificate was entirely subject to the defendant's control. It was not bound to deliver it at all, but it had the right to reconsider and erase it or otherwise remove it at any time before it passed out of the defendant's control by a delivery, and it became the defendants to do that when the notice was received forbidding payment of the check. It had then incurred no liability by means of its certificate, and it was not afterward at liberty to create it and charge the plaintiff's funds with the consequences of it."<sup>2</sup> But if the check has been returned before receiving the notice then the bank must pay it.<sup>3</sup>

<sup>1</sup> Continental Nat. Bank v. National Bank, 50 N. Y. 575.

<sup>2</sup> Freund v. Importers & Traders' Nat. Bank, 3 Hun, 689; S. C., 6 Th. & C. 236.

<sup>3</sup> Freund v. Importers & Traders' Nat. Bank, 76 N. Y. 352; Aff., 12 Hun, 537.

(b) *Nassau Bank v. Broadway Bank*. In another case a check having been indorsed by the payee was presented to the drawee bank and certified to be "good." Afterward the drawer requested the drawee not to pay the check. When, therefore, the check was presented the bank wrote across its face "payment stopped" and returned it to the payee. The latter erased the words, put a revenue stamp over the erasure, transferred the check to another through whom the plaintiff received it for collection in good faith and without any mark on its face sufficient to create inquiry. It was held that the plaintiff must be regarded as a *bona fide* holder of the check for value and entitled to recover the amount from the drawee.<sup>1</sup>

(c) *Nolan's case*<sup>2</sup> of stolen check. A check dated Jan. 21, 1865, was drawn by M., payable to his order on the defendant bank and indorsed by himself. It was accepted by the drawee, certified as "good,"<sup>3</sup> and registered. The check was designed for circulation and not for immediate payment. On the 4th of the following month the check, while in the possession of G., was stolen. Notice of the theft was given and payment of the check was stopped on the same day. In May or June Nolan became the *bona fide* holder of it in a legitimate manner and demanded payment to which the bank refused to respond. The lower court decided in its favor on the ground that the check was taken after it was overdue and therefore subject to existing equities. But the Supreme Court held that Nolan made all needful inquiries before accepting it, that if the signatures to the check and certificate were genuine he was not bound by anything appearing on the face of it to exercise any other caution, vigilance, or diligence so far as the bank was concerned. It was his duty to show

<sup>1</sup> *Nassau Bank v. Broadway Bank*, 54 Barb. 236.

<sup>2</sup> 67 Barb. 24.

<sup>3</sup> Brown, J., in *Farmers & Mechanics' Bank v. Butchers & Drovers' Bank*, 28 N. Y. p. 428, quoted with approval the remark of Hubbard, J., in *Massey v. The Eagle Bank*, 9 Met. p. 311, "that unless the word 'good' carries with it binding evidence of the fact that the money is in the bank to meet that particular check, and that it will be paid to the bearer at any time when presented, it is of no practical utility."

that he was a *bona fide* holder for value, but the lower court did wrong in not permitting him to establish the fact and therefore a new trial was granted.

§ 236. **Certified check is payment.** As the certification is a simple and unconditional obligation to pay on demand, this may be made whenever it suits the convenience of the party entitled to the stipulated payment. "When the business of the bank is properly conducted, it is the duty of the officer certifying the check to cause it to be immediately charged as paid, in the account of the drawer, and when this is done the sum thus charged will remain as a deposit in the bank to the credit of the check and be forever withdrawn from the control of the maker except as a holder of the check. Such a deposit stands exactly upon the same ground as every other." No negligence, therefore, can be imputed to the holder of such a check in delaying his demand for payment. "The bank, instead of being prejudiced is benefited by the delay of its owner in calling for its payment, and can with no more propriety impute laches to the unknown holder of the check than to a known holder of an ordinary deposit. . . There is in reality, in good sense, no distinction in the nature of the liability created between a certified check and the note of the bank payable on demand. Each is intended to circulate as money, each is an absolute promise to pay a specific sum upon demand, and laches in making the demand is no more imputable in the one case than in the other."<sup>1</sup>

(a) *Opinion of New York Court of Appeals.* "Ordinarily where the payee or holder of a check which is payable immediately instead of demanding payment procures the check to be certified, the check is as between the drawer and holder regarded as paid, and the holder must look to the bank whose obligation it has accepted in lieu of the money, because by procuring the certification he has caused an amount of the

<sup>1</sup> C. J. Oakley, *Willets v. Phoenix Bank*, 2 Duer, p. 132; *Nolan v. Bank*, 67 Barb. 24; *Farquhar v. Southey*, 2 Car. & P. 497; *Dingwall v. Dunster*, Doug. 247.

drawer's fund, or credit, equal to that for which the check was drawn, to be set apart for the payment of that check and withdrawn from the control of the drawer, and his funds are as effectually diminished as if the money had been paid; while the bank has given a negotiable obligation to the holder of the check which is equivalent to a certificate of deposit. If the holder of the certified check should lose it, he would still have his remedy upon it against the bank, but could not have recourse against the drawer whose funds had been thus locked up, or transferred to the credit of another party. And even the subsequent payment of the check by the bank upon a forged indorsement would not relieve it of its liability upon the contract it had made with the true owner nor restore to the drawer the right to draw upon the bank for the funds which had been appropriated to the payment of the check and were consequently no longer his."<sup>1</sup>

§ 237. **Acceptance by deducting amount from drawer's account.** Beside accepting a check orally or in writing, this can be accomplished in a third way, namely, by deducting the check from the drawer's account. When this is done the act is regarded as an acceptance.<sup>2</sup> But when a check has been certified or accepted the holder "can have no greater rights than those of any other depositor."<sup>3</sup>

§ 238. **Certifying insolvent drawee's check.** It is a fraud for a drawer to obtain a certification after he has become insolvent. Whenever this is done the certifying bank has a

<sup>1</sup> Rapallo, J., *Thomson v. Bank*, 82 N. Y. 1, p. 6, citing *Freund v. Importers & Traders' Nat. Bank*, 12 Hun, 537, aff. by 76 N. Y. 352; *First Nat. Bank v. Leach*, 52 Id. 350; *First Nat. Bank v. Whitman*, 94 U. S. 343. "The certification constitutes a new and distinct contract between the holder and certifying bank, which becomes the debtor of and only liable to the holder. The funds of the drawer have in legal contemplation been withdrawn from his credit and appropriated to the payment of the check. He and the indorser, if any, are released from all further liability; as to them the check is paid," *Clopton, J., National Com. Bank v. Miller*, 77 Ala. p. 174.

<sup>2</sup> *Seventh Nat. Bank v. Cook*, 73 Pa. 483.

<sup>3</sup> *Strong, J., Girard Bank v. Bank*, 39 Id. p. 99.



right to reclaim or countermand the payment of the check unless it has been previously transferred to an innocent holder.<sup>1</sup>

§ 239. **Certifying a draft or note.** "The certification by a bank of an acceptance made payable at its counter by one of its customers has the same significance and imports the same obligation on the part of the bank as a like certification of a check drawn on it, and has the same legal effect. In one instance it is an admission that the acceptor, and in the other that the drawer, has money on deposit in the bank with which to pay the paper when presented for payment and the bank will retain the money on deposit to pay the holder, and will retain the same on deposit subject to the order of the holder."<sup>2</sup> The certification is an absolute engagement on the part of the bank and dispenses with protest or steps to charge the indorser as much so as if the owner had actually received the cash on the presentation of the note instead of taking the certificate of the teller that the note is good. And if the teller certifies falsely, but the owner does not know this, and omits to charge an indorser he can recover.<sup>3</sup>

(a) *Effect of taking it away.* But if the holder of a note present it when due at the bank where it is made payable, and the maker has enough money on deposit there to pay the same, and the teller certifies that it is "good," this will not change the liability of the parties if the holder take it away, nor release the maker from his liability even though he should lose his deposits by the failure of the bank the next day.<sup>4</sup> It must be remembered, however, that in Illinois a bank has no right without an explicit direction from its depositor to pay his notes made payable there.<sup>5</sup>

(b) *When certification may be corrected.* If by mistake a bank certify a promissory note to be "good" which is payable

<sup>1</sup> Bank v. Baxter, 31 Vt. 101.

<sup>2</sup> Barker, J., Flour City Nat. Bank v. Traders' Nat. Bank, 35 Hun, p. 244.

<sup>3</sup> Meads v. Merchants' Bank, 25 N. Y. 143.

<sup>4</sup> Wood v. Merchants' Sav., Loan, and Trust Co., 41 Ill. 267.

<sup>5</sup> § 403, b.

there, it can correct the mistake before any liability has been incurred or loss sustained.<sup>1</sup>

§ 240. **Revocation of bank's action.** "While the check is ordinarily executory and revocable, and the drawer may countermand its payment; when the bank has certified the check, and thereby comes under obligation to the holder to pay it on presentment, the power to revoke ceases as effectually as if actual payment had been made. The drawer's authority over the funds on which it is drawn terminates *pro tanto*."<sup>2</sup>

§ 241. **When money is due on certified check.** Whenever a check is certified the money is due and payable by the certifier. Says Judge Peckham: "The bank virtually says, that check is good; we have the money of the drawer here ready to pay it. We will pay it now if you will receive it. The holder says no, I will not take the money; you may certify the check and retain the money for me until this check is presented. The law will not permit a check when due, to be thus presented and the money to be left with the bank for the accommodation of the holder without discharging the drawer. The money being due and the check presented, it is his own fault if the holder declines to receive the pay, and for his own convenience has the money appropriated to that check subject to its future presentment at any time within the Statute of Limitations."<sup>3</sup>

§ 242. **Collecting bank should not send check to certifier.** A bank or agent in collecting a certified check should not send it to the certifying bank itself for payment. This would put the instrument in the hands of the party primarily liable and enable him to destroy the evidence of debt and repudiate the transaction. Says Judge Schofield: "Surely it could not be held reasonable care and diligence in an agent holding for

<sup>1</sup> Second Nat. Bank v. Western Nat. Bank, 51 Md. 128.

<sup>2</sup> National Com. Bank v. Miller, 77 Ala. 168, p. 176.

<sup>3</sup> First Nat. Bank v. Leach, 52 N. Y. p. 353; Drovers' Nat. Bank v. Anglo-American Pack. & Prov. Co., 117 Ill. 100.

collection the promissory note given by one individual to another individual to send the promissory note to the maker trusting to him to make payment, delay it, or destroy the evidences of indebtedness, and repudiate the transaction, as his conscience might permit.”<sup>1</sup> In another noteworthy case Judge Hopkins said that the duty of the defendant bank, “upon receipt of the check for collection was plain. It was to present it for payment, and only for payment. This it did at first, and if it had stopped then there would have been no liability upon it. But it did not, it went further; it asked for and received the certification of the bank upon the check. By this act a new relation was created between the parties. The amount the check called for was withdrawn from the drawer’s account and control, and thereafter they had no right of action for it against the bank. The technical operation of the transaction was a transfer to the holder of the check of the drawer’s funds and right of action against the bank. It superseded the previous rights and obligations of the parties, particularly of the drawers. Before that, the drawers could have stopped payment of the check or withdrawn the funds by other checks. After the certification they had no control over the funds or action of the bank in reference to it, nor any right to sue the bank for it. Nor did the bank owe them any duty in relation to it. It no longer possessed the character of a check. If the drawers had taken it up before its certification it would have been useless, but after that they could only get the money by surrendering it. It resembles, after certification, more the certificate of deposit than a check. Now, what was the effect upon the legal rights and liability of the drawers? Did it not discharge them from all further liability upon the check?” And the court held that it did. And further, that the defendant should make good the loss.<sup>2</sup>

<sup>1</sup> *Drovers’ Nat. Bank v. Anglo-American Pack. & Prov. Co.*, 117 Ill. 100.

<sup>2</sup> *Essex Co. Nat. Bank v. Bank of Montreal*, U. S. Cir. Ct., 15 Am. Law Reg., N. S., 418.

§ 243. **If no loss no recovery.** A person cannot recover on a certified check unless a loss has been sustained from receiving it. Thus C., W. & Co. were depositors with the Louisiana State Bank and drew a check thereon for \$5000 which was cashed. Some of the deposits made by the firm consisted of good money, but the principal portion consisted of forged checks deposited on the day the above-mentioned check was paid. Later in the same day the firm presented another check for \$10,000 for payment. This the bank declined to pay until those previously deposited were certified. Shortly afterward the Hibernia Bank on which they were drawn did certify them. Had the firm called after this the money would have been paid on the \$10,000 check, but they absconded, knowing that their forgeries would soon be discovered. The Louisiana State Bank then sued the other for their loss, but as it had not been occasioned by receiving the certified checks it could not recover.<sup>1</sup>

§ 244. **Certified check altered by drawer.** If a bank certify a check as good, which is payable to the order of a certain payee, and subsequently it is altered by the drawer and made payable to bearer, and thus altered is paid by the bank to an unknown person before the original payee is advised of the certification and before any third person has acquired an interest therein, the bank cannot be held for any loss that may happen from paying the check springing from an agreement between the several parties and to which the bank was not privy.<sup>2</sup>

<sup>1</sup> Louisiana State Bank v. Hibernia Bank, 26 La. Ann. 399.

<sup>2</sup> Abrams v. Union Nat. Bank, 31 Id. 61.

## CHAPTER VIII.

## PAYMENT OF CERTIFICATES OF DEPOSIT.

§ 245. **Bank liable to bona fide holder.** Banks frequently give certificates of deposit to persons who leave money with them. "When they do this," says Judge Learned, "and when they make the certificate payable on its return, properly indorsed, they have then added to their original undertaking as a depository an agreement that they will pay the deposit to the holder of that certificate properly indorsed. . . It follows, therefore, that they are liable to a *bona fide* holder of the certificate, notwithstanding a payment to the original depositor."<sup>1</sup>

§ 246. **Certificate described.** The best mode of describing a certificate is perhaps to give the form of one. The following certificate of deposit, which occasioned litigation in Massachusetts, is more generally used than any other: "The Pacific National Bank of Boston, Mass., \$1000, Boston, May 18, 1881. This certifies that Wm. H. Nichols has deposited in this bank one thousand dollars, payable to the order of himself on return of this certificate properly indorsed. J. M. Pettingill, Cashier. No. 1807." Many variations of this form occur. These consist chiefly in adding words relating to interest, and also to the time when the deposit is to be paid, instead of payment on demand. In one case the question was whether the following instrument, given by a firm of brokers who received deposits on demand, was a certificate: "Due A. Ashton, trustee, \$4000, returnable on demand. It is understood that this sum is specially deposited with us and is distinct from the other transactions with said Ashton." This instrument was regarded a certificate of deposit.<sup>2</sup> In

<sup>1</sup> National Bank v. Washington Co. Nat. Bank, 5 Hun, 605.

<sup>2</sup> Smiley v. Fry, 100 N. Y. 262; Aff. 49 N. Y. Sup. Ct. 134.

another case L., on making a deposit with a banker, was handed the following instrument: "Received from L. sixteen hundred dollars on deposit, in national currency." When L. sued to recover his money, more than six years after depositing it, the banker defended on the ground that the instrument was not a certificate of deposit or contract in writing, and consequently that the suit was barred by the Statute of Limitations. But the court thought otherwise. Judge Elliott said that the instrument was a written contract which was to be given legal effect, and to do this the court must consider it as embodying all the legal obligations to be implied from its language. These were a part of the written contract. The law imported into it did not create an independent agreement, but made the instrument express the full agreement of the parties. All the words found in a contract are to have a meaning attributed to them, and are not to be thrust aside. We cannot, therefore, disregard the words herein, "on deposit, in national currency." We know that the words "national currency" denote money, and we know, therefore, that those words, taken in connection with the words "on deposit," mean that the defendant had received a deposit in money from the plaintiff. We know also that the law as a factor is an essential part of the contract, and it seems very plain to us that the express agreement of the parties, considered in conjunction with this factor, imports a contract to repay the deposit on demand. Suppose the defendant had attempted to show by parol that he was not to repay the money, would not that attempt have been defeated by the proposition that such a contract cannot be varied by parol evidence? Of this there can be no doubt. If the defendant had inserted in the contract the words, "we promise to pay back the depositor his money," the legal force and effect of the contract would not have been increased, for the law implies that this return was intended.<sup>1</sup>

<sup>1</sup> Long v. Straus, 107 Ind. 94.

§ 247. **Is certificate a promissory note.** (a) *Negative view.* Is a certificate of deposit a receipt for money, or a promissory note? Judge Colburn, of Massachusetts, has said that a certificate, similar to the one described, is not merely a promise to pay a certain sum, but it declares that a certain fund has been deposited which is payable to the depositor, or his order, on the return of the certificate properly indorsed. "A promissory note, payable on demand, is due as soon as it is given; an action may be brought upon it immediately without demand, and the Statute of Limitations begins to run against it from its date.<sup>1</sup> A certificate of deposit is not due until a demand is made and the certificate returned or tendered.<sup>2</sup> Such certificates are issued with the design that they shall be used as money, and taken with as much confidence as the bills of the bank, and to avoid the risk and inconvenience of keeping, carrying, and counting sums of money, and are so regarded in mercantile affairs."<sup>3</sup> Finally, the Judge added: "Such certificates are not commonly known in the community as promissory notes."<sup>4</sup> In Pennsylvania the same view has long been maintained,<sup>5</sup> and, consequently, as they are not negotiable, a holder to whom one may be indorsed subsequent to the service of an attachment on the bank having the money cannot hold the amount against the attaching creditor.<sup>6</sup>

(b) *Affirmative view.* On the other hand, Chief Justice Ryan, of the Supreme Court of Wisconsin, after quoting Story's definition of a promissory note, says: "The ordinary form of a certificate of deposit of money falls precisely within

<sup>1</sup> *Field v. Nickerson*, 13 Mass. 131; *Newman v. Kettelle*, 13 Pick. 418; *Burnham v. Allen*, 1 Gray, 496.

<sup>2</sup> *Bellows Falls Bank v. Rutland County Bank*, 40 Vt. 377; *Munger v. Albany City Nat. Bank*, 85 N. Y. 580.

<sup>3</sup> *Merchants' Bank v. State Bank*, 10 Wall. 604, p. 648.

<sup>4</sup> *Shute v. Pacific Nat. Bank*, 136 Mass. p. 488.

<sup>5</sup> *Patterson v. Poindexter*, 6 Watts & Serg. 227; *Charnley v. Dulles*, 8 Id. 353; *Gillespie v. Mather*, 10 Pa. 28; *Lebanon Bank v. Morgan*, 28 Id. 452.

<sup>6</sup> *Lebanon Bank v. Morgan*, *supra*.

the definition, and it seems strange that there ever was a doubt that it was in law a negotiable promissory note.<sup>1</sup> Such doubt, however, may now be considered at rest."<sup>2</sup> The Supreme Courts of Michigan, Minnesota, Iowa, North Carolina, Georgia, Illinois, Vermont, and other States, maintain this view.<sup>3</sup>

(c) *Opinion of New York Court of Appeals.* The opinion of the New York Court of Appeals may be briefly reviewed. An action was brought on the certificate of a savings bank to recover a sum of money payable to the order of the plaintiff in current bank-notes on the return of the certificate with interest, and indorsed by the defendant. It was conceded that unless the instrument was negotiable by indorsement, the plaintiff could not maintain his action against the indorser. "It is laid down in *Parsons on Bills*,"<sup>4</sup> said Judge Miller, "that a certificate of deposit in the usual form possesses all the requisites of a negotiable promissory note, and that such is the prevailing opinion. In *Miller v. Austen*<sup>5</sup> this very question was distinctly presented, and the same principle was upheld. Catron, J., who delivered the opinion of the court, says, 'The established doctrine is that a promise to deliver or to be accountable for so much money is a good bill or note. . . Every reason exists why the indorser of this paper should be held responsible to his indorsee that can prevail in cases where the paper indorsed is in the ordinary form of a promissory note. . . Every reason exists why the indorser of this

<sup>1</sup> *O'Neill v. Bradford*, 1 Pinn. 390, and cases there cited. Some points in this case were questioned in *Ford v. Mitchell*, 15 Wis. 304.

<sup>2</sup> *Klauber v. Biggerstaff*, 47 Wis. p. 555; *Kilgore v. Bulkley*, 14 Conn. 362; *Bank v. Merrill*, 2 Hill, 295; *Miller v. Austen*, 13 How. 218.

<sup>3</sup> *Trip v. Curtenius*, 36 Mich. 494; *Cate v. Patterson*, 25 Id. 191; *National State Bank v. Ringel*, 51 Ind. 393; *Drake v. Markle*, 21 Id. 433; *Gregg v. Union Co. Nat. Bank*, 87 Id. 238; *Brown v. McElroy*, 52 Id. 404; *Carey v. McDougald*, 7 Ga. 84; *Lowe v. Murphy*, 9 Id. 338; *Talladega Ins. Co. v. Woodward*, 44 Ala. 287, p. 289; *Loughlin v. Marshall*, 19 Ill. 390; *Bank v. Farnsworth*, 18 Id. 563; *Bean v. Briggs*, 1 Iowa, 488; *Welton v. Adams & Co.*, 4 Cal. 37.

<sup>4</sup> Vol. i. p. 26.

<sup>5</sup> 13 How., U. S. 218, p. 228.



paper should be held responsible to his indorsees that can prevail in cases where the paper indorsed is in the ordinary form of a promissory note, and as such note, the State courts have generally treated certificates of deposit payable to order, and the principle adopted by the State courts in coming to this conclusion is fully maintained by the writers of treatises on bills and notes.' In this State we are not without authority upon the subject, and in *Bank of Orleans v. Merrill*,<sup>1</sup> where the action was upon a certificate of deposit, it was said that the instrument in question was in effect a promissory note. . . In *Barnes v. Ontario Bank*<sup>2</sup> the action was brought to recover the amount of a certificate of deposit, and it was held that a *bona fide* holder could recover against the bank, although the cashier had put it in circulation with the fraudulent design of diverting the funds of the bank, and that the indorser was also liable upon said certificate. In the opinion by Comstock, J., it was said in reference to an instrument of this kind, 'A certificate is a promissory note.' And in the opinion of Allen, J., 'the certificate was a negotiable instrument.' This case is directly in point, and, I think, settles the question in this State."<sup>3</sup>

(d) *Hotchkiss v. Mosher*.<sup>4</sup> Although in New York a certificate is regarded as a promissory note, in this case the certificate given to the depositor was declared to be simply an acknowledgment of money. The word "certify," remarked the court, added "no additional force to the instrument as purporting a contract." The facts were that H. paid the amount of certain notes which he had guaranteed to M., a banker, for the purposes of fulfilling his engagement. As a voucher of the transaction, M. delivered to him a certificate of deposit for the amount. In an action for converting them

<sup>1</sup> 2 Hill, 295.

<sup>2</sup> 19 N. Y. 152.

<sup>3</sup> *Pardee v. Fish*, 60 Id., p. 268. A certificate of deposit in the usual form with additional words agreeing to pay interest is a negotiable instrument, *Munger v. Albany City Nat. Bank*, 85 Id. p. 587. Whether a clearing house due bill is a certificate, see § 420.

<sup>4</sup> 48 N. Y. 478.

—having been left with M. for collection—it was decided that the certificate was a voucher, and that the plaintiff had paid the money for the notes.

(e) *Coleman's case*<sup>1</sup> is more instructive. He handed a sum of money to the bank teller over the counter, stating that he desired to leave it on deposit with the bank. The teller gave him a certificate, which was in form an acknowledgment that C. had deposited the money with Van C., and contained a personal obligation on the part of the latter to repay the amount. Van C. was the bank's president, the certificate was signed by him, and not in his official capacity. The bank was not named in the certificate, and there was nothing on its face indicating that the deposit was with the bank, or that it assumed any obligation in regard to the money. C. did not read the certificate when he received it. In an action to recover the amount of the deposit, the defence was that the certificate was a written contract by which alone Coleman's right could be determined, and that parol proof of making the deposit with the bank could not be admitted. "But," said Judge Andrews, "assuming that the certificate signed by Van Campen when accepted by the plaintiff became a written contract between them, parol evidence that the bank received the money as a deposit did not contradict any written agreement between the bank and the plaintiff, for they had made none. The real issue on the trial was whether the bank or Van Campen was the depository. Unexplained, the fact that the plaintiff accepted the certificate of Van Campen was strong, if not conclusive evidence that the bank was not a party to the transaction; but it was evidence only, and was subject to explanation by parol proof. . . If the plaintiff had examined the certificate he would have been apprised of the fact that it purported to be the individual obligation of Van Campen. But he did not do so. He had a right to suppose that it was the proper acknowledgment of

<sup>1</sup> *Coleman v. First Nat. Bank*, 53 N. Y. 388; *West v. First Nat. Bank*, 20 Hun, 408; *Bowman v. Bank*, 7 Alb. L. J. 170.

the bank with which the money was deposited. The doctrine of constructive notice, from the possession of the certificate, would be misapplied if, in this case, it should be held to exempt the bank from liability."

(f) *Criticism of cases.* That justice was wrought in these cases, no one will question; but wherever a certificate is regarded as a promissory note, how can such evidence be admitted without violating the general rule that parol evidence is inadmissible to explain, vary, or contradict the terms of the written contract? We think the Supreme Court of Indiana has been more consistent in holding that a certificate of deposit is a contract, and that no parol evidence of a previous or concurrent agreement is admissible to contradict or vary the legal effect of the certificate.<sup>1</sup>

Not only is the decision in *Hotchkiss v. Mosher* in conflict with this view, but is also, said the Indiana court, "with the cases in New York and elsewhere, and cannot be accepted as the law. The case is not a well-considered one, for no authorities are cited in support of the conclusion announced. It is held by many courts, including our own, that an order for property, accompanied by a direction to change its value to an owner, is a written contract containing the promise to pay its value.<sup>2</sup> The principle which those cases declare is the same as that here involved, for the principle on which they proceed is that the law imports into the order a promise to pay; and that is true of such an instrument as the one now before us." Evidence, however, may be introduced in an action on a certificate, not to reform or contradict it, but to establish a subsequent arrangement between the parties.<sup>3</sup>

§ 248. **Liability without deposit.** A bank is liable for a

<sup>1</sup> *Long v. Straus*, 107 Ind. 94.

<sup>2</sup> *Garmire v. State*, 104 Id. 444; *United States v. Book*, 2 Cranch, C. C. 294; *United States v. Brown*, 3 Id. 268; *State v. Morgan*, 35 La. Ann. 293; *State v. Ferguson*, Id. 1042; *Anderson v. State*, 65 Ala. 553; *Burke v. State*, 66 Ga. 157; *Peete v. State*, 2 Lea, 513; *State v. Keeter*, 80 N. C. 472; *People v. Shaw*, 5 Johns. 236; *Commonwealth v. Fisher*, 17 Mass. 46.

<sup>3</sup> *Woods v. Russell*, Pa. Sup. Ct., 2 Eastern Rep. 638.

certificate of deposit signed by its cashier even though no deposit has been made.<sup>1</sup> In a case of this kind the certificate was made by the cashier for the purpose of raising money, and was delivered to an agent to sell. He did sell it, the buyer agreeing not to present it for thirty days. The bank, therefore, received money for it though not from the person to whom it was given.

(a) *Not liable if made with officer instead of company.* If, however, the deposit be made with the officer of a company and not with the company itself, the depositor cannot recover against the latter. Thus, when M. deposited with the agent of a banking association four hundred and thirty dollars in tickets, to him only, and on the return of the certificate, the association was not liable.<sup>2</sup>

§ 249. **Cannot question ownership.** If the certificate be issued to an unincorporated association, as to the "Ladies' Congregational Sewing Society," the bank cannot question the right of the association to maintain an action thereon.<sup>3</sup>

§ 250. **Negotiability.** (a) *New York view.* In the orderly unfolding of the subject, we may next inquire whether a certificate of deposit is negotiable in the usual manner by indorsement. Yes, if having the negotiable words usually found in instruments of that nature.<sup>4</sup> Of these requirements one is that the promise to pay shall be money. Many certificates, however, are not expressed in that way, but, "in current funds," and in such cases the question is, Are the words an equivalent expression? They are declared to be in New York. In *Pardee v. Fish*,<sup>5</sup> the negotiability of the certificate

<sup>1</sup> *Barnes v. Ontario Bank*, 19 N. Y. 152.

<sup>2</sup> *Lake v. Munford*, 4 Sm. & M. 312; *First Nat. Bank v. Williams*, 100 Pa. 123.

<sup>3</sup> *Bank v. Sewing Society*, 28 Kansas, 423, citing *Esley v. The People*, 23 Id. 510.

<sup>4</sup> *Piner v. Clary*, 17 B. Mon. (Ky.) 645. A certificate of deposit issued by a banker of another State and indorsed by the payee in Kentucky assumes in the latter State the character of a foreign bill, Id. p. 663.

<sup>5</sup> 60 N. Y. 265.

was disputed because it was payable in current bank notes instead of money. But Judge Miller said: "The authorities in this State, I think, are adverse to this position. In *Keith v. Jones*,<sup>1</sup> the note upon which the action was brought was declared to be payable in 'New York State bills or specie,' and it was said that it is the same thing as being made payable in lawful current money of the State, for the bills mentioned mean bank paper, which is here, in conformity with common usages and common understanding regarded as cash.' In *Judah v. Harris*,<sup>2</sup> a promissory note, payable 'in bank notes current in the city of New York,' was held to be a negotiable note within the statute. It is said that these decisions were placed upon the ground that the Court could take judicial notice that such bills are equivalent to specie. The same rule may well apply here, as 'current bank notes' are notes or bills used in general circulation as money, and constituted the general currency of the country, recognized by law at the time and place where payment was to be made and demanded. These notes, which were in circulation when the certificate was given and payment demanded, were almost of one kind and authorized by the government as currency. They thus being lawful money of the United States, the court were bound to take judicial notice of that fact."<sup>3</sup>

(b) *Use of "currency."* The word "currency" will suffice in Wisconsin,<sup>4</sup> though it would not formerly,<sup>5</sup> and also in Indiana.<sup>6</sup> But if the depositor is to be paid "in current funds" the certificate is not negotiable in Indiana,<sup>7</sup> nor in North

<sup>1</sup> 9 Johns. 120.

<sup>2</sup> 19 Id. 144.

<sup>3</sup> The cases of *Lieber v. Goodrich*, 5 Cow. 186, and *Thompson v. Sloan*, 23 Wend. 71, were declared to be not in conflict with *Keith v. Jones*, and *Judah v. Harris*.

<sup>4</sup> *Klauber v. Biggerstaff*, 47 Wis. 551.

<sup>5</sup> *Ford v. Mitchell*, 15 Id. 304; *Platt v. Sauk Co. Bank*, 17 Id. 222; *Lindsey v. McClelland*, 18 Id. 481.

<sup>6</sup> *Drake v. Markle*, 21 Ind. 433.

<sup>7</sup> *National State Bank v. Ringel*, 51 Id. 393; *Conwell v. Pumphrey*, 9 Id. 135.

Carolina,<sup>1</sup> nor in Pennsylvania.<sup>2</sup> It is negotiable, though, in Tennessee.<sup>3</sup>

(c) *Assignable if not negotiable.* While a certificate thus payable is not negotiable in Indiana, like an inland bill of exchange, it is assignable there. One result flowing from this principle in that State is that the payee can recover the amount when the certificate is stolen, on adequate proof of the theft, without giving the bank a bond of indemnity against a subsequent claim by another person.<sup>4</sup>

(d) *Effect of indorsement.* Formerly a certificate in Wisconsin was not negotiable, and consequently a payee who transferred it by indorsement was not liable thereon,<sup>5</sup> but this is no longer the law.<sup>6</sup> In Minnesota, however, an indorsement of a certificate is nothing more than an assignment of the beneficial interest therein. "The law relating to the liability of indorsers of commercial paper is inapplicable to the parties to such contracts."<sup>7</sup> This is not the rule prevail-

<sup>1</sup> Johnson v. Henderson, 76 N. Car. 227.

<sup>2</sup> McCormick v. Trotter, 10 Serg. & Raw. 94; Wharton v. Morris, 1 Dall. 125.

<sup>3</sup> Simpson v. Moulden, 3 Cold. 429; see Kirkpatrick v. McCullough, 3 Humph. 171; Whelan v. Childress, 7 Id. 303.

<sup>4</sup> National State Bank v. Ringel, 51 Ind. 393.

<sup>5</sup> O'Neill v. Bradford, 1 Pinn. 390.

<sup>6</sup> Ford v. Mitchell, 15 Wis. 304.

<sup>7</sup> Easton v. Hyde, 13 Minn. 90. In this case a "certificate of deposit," beginning with the words quoted continued thus: "Chicago, July 14, 1864. Hyde and Broughton have deposited in this office five hundred and thirty-five and 75-100 dollars in treasury notes to the credit of themselves, and payable to their order hereon in United States six per cent. interest-bearing bonds." This was held to be not a promissory note, but a contract to deliver United States bonds of the nominal value of \$535.75. See Smith v. Dunlap, 12 Ill. 184; Anderson v. Ewing, 3 Littell, 245; Phelps v. Riley, 3 Conn. 266; Robinson v. Noble, 8 Peters, 181.

A certificate of deposit for \$1150 to draw interest if left for thirty days and payable on return of the certificate properly indorsed, is a good promissory note, Cuyahoga Steam Furnace Co. v. Lewis, Cuyahoga District Ct. Ohio, Cent. Law Rec. 15.

A certificate of deposit of money in bank payable to the order of the depositor with interest at a future day on return thereof is not negotiable so as to charge the indorser, Austin v. Miller, Superior Ct. Hamilton Co., Ohio, 4 West. Law Jour. 527.

ing in most of the States. And the transfer of a certificate by delivery without indorsement is a valid assignment and effectually passes the property therein if this be intended.<sup>1</sup>

§ 251. **Their use as money.** When the question was first answered by the courts whether certificates of deposit were promissory notes, it was asserted that they were used by some of the banks as currency and consequently were forbidden by law. Thus a certificate which was given by a New York bank payable to a person six months after date, with interest, was considered a promissory note, and its issue was held to be illegal by law of that State;<sup>2</sup> and also in Illinois;<sup>3</sup> nor was their illegality cured by circulation among innocent holders.<sup>4</sup> At a later period it was declared more broadly that certificates of deposit payable at a future day were promissory notes, and consequently could not be legally issued.<sup>5</sup> Likewise certificates of deposit which were issued as loans, irredeemable within twenty years and bearing interest, were declared to be a violation of the issuer's charter, which forbade the issuing of notes or other evidences of debt upon loan or for circulation as money.<sup>6</sup> But the issue of negotiable certificates of deposit for large amounts payable with interest at a distant day and in a foreign country, were not considered a violation of the statute forbidding the issue of certificates for circulation as money. It was said that "the large amount of each certificate, the distant day at which they were payable, the fact that they bore interest and were payable in foreign money and in a foreign country would entirely prevent them filling the place of currency."<sup>7</sup> Even when the "charter of a company prohib-

<sup>1</sup> *Shanklin v. Commissioners of Madison County*, 21 Ohio St. 575.

<sup>2</sup> *Bank of Orleans v. Merrill*, 2 Hill, 295; *Smith v. Strong*, Id. 241; *Safford v. Wyckoff*, 1 Id. 11.

<sup>3</sup> *Bank of Peru v. Farnsworth*, 18 Ill. 563.

<sup>4</sup> *Bank of Chillicothe v. Dodge*, 8 Barb. 233.

<sup>5</sup> *Leavitt v. Palmer*, 3 N. Y. 19; *Southern Loan Co. v. Morris*, 2 Pa. 175; see *Craig v. State of Missouri*, 4 Peters, p. 433; *Ontario Bank v. Schermerhorn*, 10 Paige, 109.

<sup>6</sup> *New York Life Ins. & Trust Co. v. Beebe*, 7 N. Y. 364.

<sup>7</sup> *Schermerhorn v. Talman*, 14 N. Y. 93; *Curtis v. Leavitt*, 17 Barb. 309.

ited it from issuing for circulation as money . . certificates of deposit payable to bearer," it was decided that the issuing of certificates of deposit, which were not intended to circulate as money, was not a violation of the instrument.<sup>1</sup>

§ 252. **Issue not forbidden by national banking law.** Nor is the issue by a national bank of a certificate of deposit, similar to that described, a violation of the national statute, which forbids these institutions from issuing other notes to circulate as money beside those in general use. "If," says Judge Colburn, "the United States Revised Statutes forbade the issue of any other notes whatever than such as were therein authorized it would be difficult to hold this certificate to be legal.<sup>2</sup> But, assuming that it might fall within the general designation of a note, it cannot be considered as a note intended to circulate as money within the meaning of the statute. It requires to be indorsed. It was understood not to be payable till a certain future date. It is not in a sum adapted for general circulation as money. The form of the instrument, and the incidents above mentioned, show that it was not intended to circulate as money between individuals and between government and individuals for the ordinary purposes of society."<sup>3</sup> Nor is such a certificate a promissory note within the meaning of a statute of Massachusetts, which provides that in an action by an indorsee against the promissor on a promissory note, payable on demand, any matter shall be deemed a legal defence which would be a defence to a suit thereon if brought by the promisee. Hence in an action by the indorsee to recover the amount of the certificate the bank cannot set off a debt due from the original depositor.<sup>4</sup>

§ 253. **Nor by New York banking law.** Nor is a certificate to the credit of the depositor payable on return thereof, pro-

<sup>1</sup> Mumford v. American Life Ins. & Trust Co., 4 N. Y. 463.

<sup>2</sup> Miller v. Austen, 13 How. 218.

<sup>3</sup> Hunt, appellant, 141 Mass. 515; Riddle v. First Nat. Bank, 27 Fed. Rep. 503. A bank certificate of deposit is not money or its equivalent, Dougherty v. Hughes, 3 Greene, Iowa, 92.

<sup>4</sup> Shute v. Pacific Nat. Bank, 136 Mass. 487.



perly indorsed "with interest 5 per cent. on demand, or 6 per cent. if not called for in one year," contrary to the statute, which declares that "no banking association or individual banker, as such, shall issue or put in circulation any bill or note of said association or individual banker, unless the same shall be made payable on demand, and without interest."<sup>1</sup>

§ 254. **How affected by statute of limitations.** In many States a certificate is a continuing security, and no action can be maintained thereon, or the Statute of Limitations be put into operation against it until after making a demand for payment.<sup>2</sup> This is an exception to the rule concerning promissory notes payable on demand.<sup>3</sup> A bank which was sued by the holder of a certificate of deposit defended on the ground that as the certificate was payable forthwith, and nothing had been heard of it for more than seven years, it was presumed to be dishonored, and was, therefore, taken by the assignee subject to all equities. But the court thought otherwise. "The very nature of the instrument and the ordinary modes of business show that a certificate of deposit, like a deposit credited in a pass-book, is intended to represent moneys actually left with the bank for safe keeping, which are to be retained until the depositor actually demands them. Such a certificate is not dishonored until presented."<sup>4</sup> But in Indiana, the indorsee of a bank's certificate of deposit, not bearing interest, who received it more than six years after it had been paid and should have been surrendered, took it as dishonored paper and not as a continuing negotiable security,

<sup>1</sup> *Pelham v. Adams*, 17 Barb. 384.

<sup>2</sup> *Munger v. Albany City Nat. Bank*, 85 N. Y. p. 587; *Payne v. Gardiner*, 29 Id. 146; *Howell v. Adams*, 68 Id. 314; *Boughton v. Flint*, 74 Id. 476; *Pardee v. Fish*, 60 Id. 265; *Bellows Falls Bank v. Rutland Co. Bank*, 40 Vt. 377; *Brown v. McElroy*, 52 Ind. 404; *McGough v. Jamison*, 107 Pa. 336; *Finkbone's Appeal*, 86 Id. 368.

<sup>3</sup> *Brown v. McElroy*, 52 Ind. 404; *Pardee v. Fish*, 60 N. Y. 265.

<sup>4</sup> *National Bank v. Washington Co. Nat. Bank*, 5 Hun, p. 607. When a stockholder is liable for the default of a bank, the owner of a certificate of deposit may sue him therefor without first making a demand of the bank, *Hodgson v. Cheever*, 8 Mo. App. 318.

and could not enforce its second payment by the bank after such unreasonable delay.<sup>1</sup> Such a certificate is to be regarded as a promissory note, and if negotiable, must be regarded as paper dishonored by lapse of time when it was negotiated.<sup>2</sup>

(a) *Varying effect among States.* While the above rule with respect to the need of making a demand before beginning an action, or setting the Statute of Limitations in motion prevails widely, it does not prevail everywhere. Thus in Georgia a bank certificate of deposit payable to the order of the depositor, but indicating no time of payment except as can be inferred from the words "interest at the rate of 7 per cent. on call, and 10 per cent. per annum," is payable on demand, and therefore due immediately, and, consequently, *bona fide* holders are affected with the equities existing between persons having it prior to themselves.<sup>3</sup> The same view is maintained in California<sup>4</sup> and in Michigan. The Supreme Court in the latter State said: "In *Brummagin v. Tallant*,<sup>5</sup> it was held that the Statute of Limitations begins to run against a banker's certificate of deposit, payable on demand from the date of the same, and that no special demand is necessary to put the statute in motion. . . We think this is the safer and better doctrine, and is correct in principle. To hold such instruments to be in legal effect promissory notes payable on demand, and yet not apply the principles applicable to demand promissory notes, either because of the peculiar form of the instrument, or because issued by a firm engaged in the business of banking, would be to create a distinction unsound in principle and one not warranted by any reason or necessity that we can discover."<sup>6</sup> But in a later case the court said that if "the question were an open one" in that State, they should be inclined to think that such a certificate did not become due until payment was demanded, as the courts in New York and Vermont had held.<sup>7</sup>

<sup>1</sup> *Gregg v. Union Co. Nat. Bank*, 87 Ind. 238.

<sup>2</sup> *Id.*

<sup>3</sup> *Meador v. Dollar Sav. Bank*, 56 Ga. 605.

<sup>4</sup> 29 Cal. 503.

*Id.*

<sup>5</sup> *Tripp v. Curteneus*, 36 Mich. 494.

<sup>7</sup> *Birch v. Fisher*, 51 Id. p. 39. See § 269.

§ 255. **When negotiable, transferable like note.** Where certificates are negotiable when expressed in negotiable words, their transfer is governed by the same rules which control promissory notes, and the liability of the indorser is the same as the indorser of a note. Hence, he is liable until actual demand is made, nor is the holder chargeable with neglect for omitting to make such a demand within any particular time.<sup>1</sup> This is in harmony with the principle which is applied to a promissory note payable on demand with interest, and indorsed; in the words of Chief Justice Comstock, it "is regarded as a continuing security; so that, on the one side, the maker is not deemed in default until the money is actually demanded, while on the other the holder may make the demand when he pleases and is not chargeable with neglect if he does not make it within any particular time."<sup>2</sup> But there is another rule that the holder of such a note, if he wishes to charge the indorser, must make his demand of the maker without delay, or, in the language of the law merchant, within a reasonable time. There is much conflict of authority on this question, but the rule first given is the most widely adopted. This rule was applied in the following case: A certificate, dated May 11th, was transferred to P. June 5th, the bank that gave it was adjudged a bankrupt on September 12th, and P. presented it for payment December 21st. In an action against F., as indorser, it was held that if neglect to make a demand within a reasonable time was a defence, there was, under the circumstances, no such laches as would prevent a recovery.<sup>3</sup>

§ 256. **Effect on ownership by delivery to mail.** If the owner of a certificate after indorsing the same to another should send it to him by mail, but without his knowledge, he would retain the ownership until received by the indorsee.<sup>4</sup> But if through lack of ordinary business caution it should pass beyond his control, any one who, within a reasonable time,

<sup>1</sup> Pardee v. Fish, 60 N. Y. 265.

<sup>2</sup> Merritt v. Todd, 23 N. Y. 28, p. 29.

<sup>3</sup> Pardee v. Fish, 60 N. Y. 265.

<sup>4</sup> Talbot v. Bank, 1 Hill, 295.

might purchase it for value and without notice of defects or equities, would be entitled to protection.<sup>1</sup> The question of good faith in such a case is for the jury to decide. The lapse of thirty-one days from the date of a certificate of deposit does not raise the presumption that the paper is dishonored, even though it be due at its date.<sup>2</sup>

§ 257. **Pledge of non-negotiable certificate.** If a non-negotiable certificate is indorsed in blank by the payee and deliverable to the holder, he can pledge it to an innocent party without reference to the equities between himself and the payee. The pledgee is authorized to infer absolute ownership and full right in the holder to pledge, but as against the true owner his recovery will be limited to the amount of the loan.<sup>3</sup>

§ 258. **Personal transfer by cashier.** A certificate of deposit to "S. B. Knapp, cashier," may be transferred by him, although the funds deposited belong to the bank. And when they are transferred, even in bad faith, though to an innocent holder, he will hold them against the bank.<sup>4</sup>

§ 259. **Grace and interest.** In some places it is the custom of banks to regard certificates of deposits issued by them as payable without grace. This custom is valid, and though a certificate in one case was in fact negotiable and entitled to

<sup>1</sup> The indorsee of a negotiable certificate of deposit having sued the maker, the latter denied that the plaintiff was the holder in good faith and for a valuable consideration. It appeared that the plaintiff's indorser was indebted to him and remitted the certificate with instructions to apply it to his credit when collected. The court, therefore, held that the plaintiff was a collecting agent for the indorsee and not a *bona fide* holder without notice, and that the certificate was subject to the equities existing between the maker and indorser, *Johnson v. Barney*, 1 Iowa, 531.

<sup>2</sup> *Birch v. Fisher*, 51 Mich. 36.

<sup>3</sup> *International Bank v. German Bank*, 71 Mo. 183 (rev. 3 Mo. App. 362), citing *Kortright v. Buffalo Com. Bank*, 22 Wend. 348; *Aff. 20 Id.* 93; *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325; *Moore v. Metropolitan Nat. Bank*, 55 Id. 41; *Weirick v. Mahoning Co. Bank*, 16 Ohio St. 296; *Combes v. Chandler*, 38 Id. 178; *Winter v. Belmont Mining Co.*, 53 Cal. 428; *Thompson v. Toland*, 48 Id. 99.

<sup>4</sup> *St. Louis Perpetual Ins. Co. v. Cohen*, 9 Mo. 421.

grace, the collecting bank was shielded by the custom in protesting it on the day of its maturity.<sup>1</sup> And if a certificate bear a specified rate of interest this will continue until it is paid.<sup>2</sup>

§ 260. **Is not payment.** A certificate is payment only by clearly-established usage. When this does not exist, the taking of a certificate does not extinguish the debt for which it was given. A. negotiated with B. for a loan of \$2000 to enable him to pay two mortgages on his farm to C. B. was willing to loan the money on a first mortgage of the farm, and applied to a banker, who was owing him, for the money to pay A. The banker, not able to pay the whole at once, paid A. \$1000, and gave him a certificate of deposit for the remainder, payable when the mortgage above mentioned should be discharged. The banker failed, and his certificate became worthless. A. then paid B. the \$1000 he had received from the banker, with interest, and tendered to him the banker's certificate of deposit for the other \$1000, and desired a release of the mortgage he had given to him. B. having refused to comply, A. appealed to the court, which decided that he did not receive the certificate of deposit as payment, and consequently that the loss thereon should be borne by B. The fact that B. settled with the banker after the giving of this certificate and credited him with the amount, had no bearing on the question at whose risk was the certificate held, for the banker should, as between himself and B. have been credited with the amount while it was outstanding, no matter who was the holder. Nor did the fact that A. attempted to get the money on the certificate before the time fixed for paying the last mortgage to C., tend to show that he had assumed the risk attending the keeping of the certificate.<sup>3</sup>

§ 261. **Can a collecting bank receive its own certificate.** When can a bank, acting as collecting agent, receive its own

<sup>1</sup> Haddock v. Citizens' Nat. Bank, 53 Iowa, 542.

<sup>2</sup> Cordell v. First Nat. Bank, 64 Mo. 600; Payne v. Clark, 23 Id. 259.

<sup>3</sup> Burrows v. Bangs, 34 Mich. 304.

certificate of deposit in payment of a debt? The well-known rule is, that an agent, having a money-demand for collection, can rightfully receive only money in payment, unless specially authorized by his principal to receive something else. Notwithstanding this rule, if the agent is a bank of deposit it may receive its own certificates of deposit as money, and its principal will be bound by the payment, and the debtor will be discharged, even though the bank soon afterward should become insolvent, and never remit to the principal. In such a transaction the principal is especially bound if he has directed the remittance to be made by draft, for it must be presumed that he expected that the draft of his agent would be sent.<sup>1</sup>

(a) *Iowa case.* The reason for this seeming exception to the rule is that, by custom, certificates of deposit are regarded as money. Of course, where they are not thus regarded, an agent cannot rightfully receive them. But if the custom to receive them as payment exist, the principal is bound by it, even if he be ignorant of its existence. The owner of a note and mortgage living in New York sent it to the Monroe County Bank of Iowa for collection, as the debtor, Massey, lived near that institution. Massey paid the note in a certificate of deposit issued by that bank. Becoming insolvent before remitting the amount to New York, the owner of the note sought to collect again of Massey. The court said that "it was shown in evidence that it was customary for the Monroe County Bank, and, indeed, for all other banks, to receive their certificates of deposit in payment of claims in the hands of the bank for collection. But it is not shown by the evidence that the plaintiff had notice of such custom. We do not think it necessary either to prove the custom or bring notice of it home to plaintiff. Courts take judicial notice of the general customs and usages of merchants, and of whatever ought to be generally known within the limits of their jurisdiction, such as matters of public history affecting

<sup>1</sup> *British & Am. Mortgage Co. v. Tibballs*, 63 Iowa, 468.

the whole people; and we think that the system by which nearly all the banks in this country transact monetary affairs by the use of checks, drafts, and certificates of deposit, and without the actual handling of bank notes or coin, is so well known and understood that no business man, much less a company, whose sole occupation is loaning money [which was the business of the plaintiff] should be allowed to profit by pleading ignorance of it. The plaintiff, in effect, claimed that Massey should have presented his certificates of deposit at the bank counter, and had the money counted out to him, and then counted it back to the cashier. The law does not require any such vain and unnecessary formality in the transaction of business.”<sup>1</sup>

§ 262. **In what must payment be made.** When the certificate requires the payment of “current notes,” the issuer must pay notes as valuable as those deposited in the event of a change in the circulation during the interval of the deposit; consequently a bank in North Carolina, which in 1860 gave a depositor a certificate stating that he had deposited a certain sum “in current notes of the different banks of the State,” and which was “payable in like current notes to said depositor, or to his order on return of this certificate,” was held liable for the whole amount with interest from the date of the demand in currency of the United States. The notes deposited were worth about par, but when the certificate was presented none of them were current. They had ceased to circulate as currency in consequence of their depreciation, and had become articles of merchandise, without retaining in any degree the character of current money. Owing to this change the bank could not perform its agreement, and the question was, on whom should the loss fall? “Obviously,” said the court, “it must fall on the bank, for it has had the use of the plaintiff’s money and is unable to return funds of the same kind; and surely the plaintiff had a right to expect funds as good as what he deposited.”<sup>2</sup>

<sup>1</sup> British & Am. Mortgage Co. v. Tibbals, 63 Iowa, 468.

<sup>2</sup> Fort v. Bank of Cape Fear, Phil. (N. C.) 417.

§ 263. **Must be given up on payment.** When the owner of a certificate demands payment, the issuer has the right to insist on its delivery as a voucher of payment and security against a future claim. And if an administrator of the owner of a certificate should sue a bank for the deposit and show that it was in the possession of a third party, but fail to show whether the owner indorsed it or not, he could not recover without producing the certificate.<sup>1</sup>

§ 264. **Alteration excuse for non-payment.** When will an alteration of the certificate excuse the issuer from paying it? The alteration of a certificate after the dissolution of a partnership by the partner continuing the business before notice to the holder does not relieve the retiring partner. Until notice of dissolution the holder has the right to consider the partnership as continuing and the alteration as authorized.<sup>2</sup> When, however, a certificate was given "payable thirty days after date, with ——— per cent. per annum," and there was no agreement to pay ten per cent., and the holder, after saying to the buyer that the agreement was for ten per cent. interest, that the blank was left by mistake, and he inserted ten therein, it was held that the alteration was fraudulent, and that no action could be maintained against the maker, either on the certificate itself or on the original consideration for which it was given.<sup>3</sup>

§ 265. **Payment without indorsement.** If a bank should issue a certificate payable to the depositor or order on return of the same properly indorsed, when could it pay the certificate to another person on presentation, but without indorsement? This question arose in the following case: A husband deposited money belonging to his wife and a certificate was issued payable to him. He delivered it to her as soon as he returned from the bank, and she kept it in her possession. Afterward she presented the certificate to the bank and demanded payment, at the same time informing the institu-

<sup>1</sup> Fells Point Savings Institution v. Weldon, 18 Md. 320.

<sup>2</sup> Howell v. Adams, 68 N. Y. 314.

<sup>3</sup> Woodsworth v. Anderson, 53 Iowa, 503.



tion that she was the lawful owner and holder, and offering to surrender it on payment. The bank refused payment, because the certificate had not been indorsed by J. C., who furthermore claimed that it was his own. But the court said that the certificate was in effect a negotiable promissory note. The fact that the sum named in it was payable "on the return" of the certificate did not raise a contingency affecting its character as such note. In the absence of these words the duty to return it upon payment would be implied, as in "the case of a negotiable promissory note in common form. Notwithstanding it is made payable to the depositor or his order, a third person may become its owner without indorsement." The bank, therefore, was obliged to pay the certificate.<sup>1</sup>

§ 266. **Should not pay if enjoined.** In paying a certificate to an indorsee while a bank is not required to ascertain whether the assignment was in good faith, yet if enjoined from paying the deposit to the depositor or his assignee, the bank should not pay the money thus deposited until the parties claiming the same have had an opportunity to determine legally the good faith of the assignment.<sup>2</sup>

§ 267. **Lost certificate.** Whenever a certificate is lost can a bank require a bond of indemnity before paying the deposit? This question has been answered by Judge Moore of the District Court of Cincinnati: "No one can become a *bona fide* purchaser of a certificate of deposit who does not take it within some reasonably short time, for the reason that banks would then be able to issue certificates of deposit of any denomination as ordinary bank bills, and with like effect. . . If the instrument was due at the time of its loss the finder or subsequent holder took it subject to all the equities existing between the original parties, and the payment to the original holder would be a bar to another action by a person who should receive the instrument after due." And hence it follows that the bank in that case was not wronged in being

<sup>1</sup> Cassidy v. First Nat. Bank, 30 Minn. 86. See § 100.

<sup>2</sup> Springfield Marine & Fire Ins. Co. v. Peck, 102 Ill. 265.

required to pay to the depositor without indemnity, because it was under no legal obligation to recognize the present holder, "if one existed as a *bona fide* holder."<sup>1</sup>

§ 268. **Where suit must be begun.** When a suit is brought on a banker's certificate of deposit it must be at the place where the same is payable, and not where he may happen to reside.<sup>2</sup> If the holder after bringing a suit thereon, surrenders it and takes a new one, his suit cannot be maintained.<sup>3</sup> Likewise, if he surrender the notes of a bank, and take a certificate therefor, he cannot claim the same rights in the distribution of assets as he could if he had held the notes.<sup>4</sup>

§ 269. **Demand in action against firm.** An action on a certificate against the personal representatives of a deceased member of a firm and the surviving partner, in which the latter is not served and does not appear, is not a demand against him.<sup>5</sup> Nor is the rendering of a statement of account by a depositor to the depository in which the sum mentioned in the certificate is charged against it under the head of accepted charges sufficient evidence of a demand to set the Statute of Limitations in motion.<sup>6</sup>

(a) *When firm changes into corporation.* A firm of bankers doing business at the P. Savings Bank, issued a certificate of deposit payable to the order of the depositor on its return. Within a year from that time the bank was incorporated, the firm transferring all their business to it. Subsequently, the holder of the certificate presented it to the bank and demanded payment from the members of the old firm. Having brought his suit against them declaring that they were "lately doing business as the P. Savings Bank," they defended on the ground that no "proper or lawful demand" had been made, but the demand was declared sufficient, and the depositor recovered.<sup>7</sup>

<sup>1</sup> *Brown v. Citizens' Nat. Bank*, 38 Bank. Mag. 135. See § 420.

<sup>2</sup> *Sanbourn v. Smith*, 44 Iowa, 152.

<sup>3</sup> *Manuel v. Mississippi R. Co.*, 2 Pa. 198.

<sup>4</sup> *Bullard v. Central Bank*, 1 Ga. 461.

<sup>5</sup> *Smiley v. Fry*, 100 N. Y. 262.

<sup>6</sup> *Id.*

<sup>7</sup> *McGough v. Jamison*, 107 Pa. 336.

§ 270. **Certificate as evidence.** A certificate of deposit is evidence of so high and satisfactory a character that to escape its effect the maker must overcome it by clear and satisfactory evidence. Slight, uncertain or contradictory evidence is not sufficient.<sup>1</sup> Furthermore, as a certificate of deposit, properly executed, is an acknowledgment that the bank has the money specified therein and credited to the depositor, the burden of proof in a suit to recover the amount, after producing the certificate, is on the bank to show that it has discharged its liability.<sup>2</sup>

§ 271. **Change of company, for private certificate.** A bank which has given a certificate to a company for deposits, cannot transfer them to the private account of its treasurer without the company's knowledge. And certainly it would have no authority to continue to charge the deposits to the private account of the treasurer after he had ceased to hold the office, whether he knew of the election of his successor or not.<sup>3</sup>

§ 272. **Holders of certificates given after bank failure.** When a commercial bank makes an assignment in trust for the benefit of a certain class of lenders and depositors, from whom it receives considerable sums of money, the holders of its certificates which are given for security will not be bound by previous representations of the officers of the bank, that the capital stock is a safety fund for the benefit of savings depositors, where it is not shown that the holders encouraged them to be made, or even knew that they had been made when they received their certificates, and especially where it is not shown that the savings depositors relied on their truthfulness.<sup>4</sup>

<sup>1</sup> First Nat. Bank v. Myers, 83 Ill. 507.

<sup>2</sup> Cushman v. Illinois Starch Co., 79 Id. 281.

<sup>3</sup> Id.

<sup>4</sup> Ward v. Johnston, 95 Id. 215; Aff. 2 Brad. 261.

## CHAPTER IX.

## PAYMENTS IMPENDING AND AFTER INSOLVENCY.

## § 273. When insolvency is unknown to receiver of check.

(a) *Dutcher case.* There are two periods of payment, by insolvent banking institutions. The first period is when they are really but not confessedly insolvent; the second period is after their insolvency has been judicially recognized. The payment of a check by a bank whose solvency was known to its officers, but not to the receiver of the money, was declared in New York not to be contrary to the national bankrupt law which rendered unlawful the transfer or assignment of any property by an incorporated company in contemplation of bankruptcy. In this case, therefore, the assignee could not recover the money.<sup>1</sup>

(b) *Other New York cases.* Nor was this decision regarded as militating against two others previously rendered by the same tribunal. The first of these was rendered in *Brouwer v. Harbeck*,<sup>2</sup> in which the court held that payments and transfers of money by a bank when actually though not avowedly insolvent or in contemplation of insolvency with intent to give a preference to creditors were within the statute which declared invalid all conveyances and payments made by corporations insolvent or in contemplation of insolvency. But this, as subsequently explained, did not mean a payment in the usual course of business, as was the payment in the *Dutcher* case. Nor would ignorance concerning the condition of the bank protect the receiver of the money when not receiving it in the ordinary way. In the other case<sup>3</sup> it was

<sup>1</sup> *Dutcher v. Importers & Traders' Nat. Bank*, 59 N. Y. 5; Rev. 1 Th. & C. 400.

<sup>2</sup> 9 N. Y. 589.

<sup>3</sup> *Robinson v. Bank*, 21 Id. 406; see *Belden v. Meeker*, 47 Id. 307.

proved that the insolvent corporation, which was the Hollister Bank, became indebted to the Attica Bank on the 28th of August, 1857, on two drafts, one of which matured on the 3d of September; the other, two days afterward. On the 29th of August, the Hollister Bank became insolvent. On the 31st of August, the payment was made by a transfer of notes which had been discounted by the Hollister Bank and by a small amount of money. The Attica bank, moreover, knew of the condition of the other. "This," said the Court of Appeals in a subsequent review of the case, "clearly was not a payment made in the usual course of business. The creditor was sought out by the debtor before the debt became due and payment made, not in cash, but by transferring notes discounted by the debtor. . . The payment was made by the debtor in contemplation of insolvency," and was invalid.<sup>1</sup>

§ 274. **Non-delivery of deposit before insolvency.** A banking firm just before the members had determined to assign marked a package with the name of a general depositor and the word "private." The amount was not all that was due to the depositor. On making the assignment the firm asked the assignee to give the package to the depositor who knew nothing of these facts until afterward. It was held that the money was not thereby delivered and consequently did not belong to the depositor.<sup>2</sup>

§ 275. **Depositors are general creditors.** When a bank passes to open or declared insolvency, the depositors are general creditors and share with the stockholders and other creditors.<sup>3</sup>

§ 276. **Preferences.** (a) *Bill-holders in Tennessee.* When these unwelcome events occur creditors often seek to establish

<sup>1</sup> *Dutcher v. Importers & Traders' Nat. Bank*, 59 N. Y. p. 10.

<sup>2</sup> *Coots v. McConnell*, 39 Mich. 742. A bank at any time can tender the full balance due to a general depositor, but cannot compel him to receive less, *Id.*

An offer of partial payment can be withdrawn at any time before acceptance, and is withdrawn and annulled by a general assignment, *Id.*

<sup>3</sup> *Matter of Franklin Bank*, 1 Paige, 249; *Bruyn v. Receiver of Middle Dist. Bank*, *Id.* 584; *Marr v. Bank of West Tennessee*, 4 Cold. 471.

preferences over one another, and these will now be considered. By statute in Tennessee bill-holders are entitled to a preference in payment over all other creditors. And the holders of certificates of deposit are also included among the preferred creditors.<sup>1</sup>

(b) *In the matter of Patterson*<sup>2</sup> a savings bank promised four other banks to deposit one-fourth of all the moneys received by it with them. On the other hand, they promised to pay interest on the daily balances in favor of the savings bank; also to pay at sight checks and drafts drawn on them, and to receive no deposits from other persons or corporations less than a thousand dollars. The contract was to run for three years, and at the end, the four banks were to pay over to the savings bank all moneys belonging to it. The court held that the moneys thus deposited by the savings bank were deposits, and that it was entitled to priority over the other creditors by the law of that State when one of the four banks failed.

(c) *Fox's Appeal*.<sup>3</sup> The charter of a bank provided that for the security of the depositors a special capital should be raised previous to the grant of letters of incorporation which "shall at all times be liable to the depositors for the amount of their deposits." The bank made an assignment for the benefit of its creditors, and in distributing its assets it was held this capital was designed to constitute a fund to be employed by the trustees for any of the legitimate purposes of the association; that it was not intended to be a special fund, separate and distinct from other funds and for the exclusive benefit of depositors. Nor could such capital be withdrawn by or refunded to the subscribers.

(d) *Draft sent to pay note*. The bank of Geneva having a large deposit in the Canal Bank on which interest was paid sold to C., on the 7th of July, a draft on the Canal Bank payable on demand to the order of its cashier, which C. sent

<sup>1</sup> *Moseby v. Williamson*, 5 Heisk. 278.

<sup>2</sup> 18 Hun, 221.

<sup>3</sup> 93 Pa. 406.

by mail to the cashier with instructions that it was to pay C.'s note of the same amount, payable at that bank on the 12th of July. The draft was received by the cashier on the 8th, and was neither indorsed by him nor accepted by the bank. On the 10th the bank failed, and on the 12th C.'s note was presented at the bank and payment was refused. Afterward, the draft was returned to C., at his request, by the receiver of the failed bank. It was decided in a suit by C., against the receiver, that C. had acquired no right to be paid the amount of his draft from the assets of the bank in preference to general creditors.<sup>1</sup>

(e) *Purchased bank check.* If one purchase a bank check on another, but does not present it for payment until the drawer has been declared a bankrupt, he is not entitled to priority of payment from the fund in the hands of the assignee, although the drawee has enough at the time of presentment to pay the check. The purchase creates no appropriation of the fund in the bank, nor gives a right of action against the drawee.<sup>2</sup> And if a sum of money be placed in a bank for a special purpose the owner cannot claim a preference in the event of the bank's insolvency.<sup>3</sup>

(f) *Trust fund.* A general deposit of a trust fund is not entitled to a preference. The ordinary relation of debtor and creditor exists in such a case and consequently the beneficiaries must share with other creditors.<sup>4</sup>

(g) *National bankrupt law.* When the national bankrupt law was in force preferences to creditors were not recognized, yet when mutual debts were adjusted just before a bankruptcy,

<sup>1</sup> Chapman v. White, 6 N. Y. 412; Cowperthwaithe v. Sheffield, 3 Id. 243; Harris v. Clark, Id. 93; Winter v. Drury, 5 Id. 525.

<sup>2</sup> In re Smith, 15 N. Bank. Reg. 459.

<sup>3</sup> Brandywine Bank's Assigned Estate, 1 Chester Co. 431; see Parkesburg Bank's Appeal, 6 Week. No. Cas. 394. In Pennsylvania note holders were entitled to a preference over the holders of certificates of deposits. Pennsylvania Bank Assignees' Account, 39 Pa. 103. They were also entitled to interest on their claim in preference to depositors, Estate of Bank of Pennsylvania, 60 Id. 471.

<sup>4</sup> Fletcher v. Sharpe, Ind. Sup. Ct., 9 Northeast. Rep. 142.

like the charging of a depositor's note against his account, this was declared valid for the reason that under bankruptcy proceedings a similar adjustment of them would be made.<sup>1</sup>

§ 277. **Completion of trust by insolvent bank.** (a) *People v. City Bank.*<sup>2</sup> When the insolvent bank has been acting in the capacity of agent or trustee for another bank or for an individual the execution of the trust is completed if possible, consequently, whenever a bank fails, creditors not infrequently have sought to show the existence of a trust relation, and not the ordinary one of debtor and creditor, in order to escape loss. This was attempted by a bank which had sent a note for collection to another which failed after collecting the money, but before paying it over. Each bank had acted as collecting agents for, and had kept a running account with the other, crediting the avails of collections, and charging whatever was sent for that purpose. A balance was struck once a week and the debtor bank remitted the balance. The avails of collections were not kept separate or distinguished in any way from the other funds of the bank. One of the banks having failed owing a balance on such account, it was held that the relation between them was simply that of debtor and creditor, that the creditor bank acquired no lien on any specific fund and was not entitled to any preference over other creditors. "The creditor bank failed to establish any lien or impress any trust on any specific money of the debtor bank which would enable it to follow any of its property or funds which went into the hands of the receiver and obtain payment in preference to other creditors. Each sum collected, as it came in, became the property of the collecting

<sup>1</sup> Winslow v. Bliss, 3 Lans. 220 ; Hough v. First Nat. Bank, 4 Biss. 349. A State under that law could prove a claim against a bankrupt bank for money deposited by the warden of a State prison with it in his name if the directors of the prison had previously arranged with the bank for such deposits and agreed on the forms of the account, although there was no law requiring him to deposit it, and although the State held a bond requiring him to account for all money coming into his hands, *In re Corn Ex. Bank*, 15 N. Bank. Reg. 216.

<sup>2</sup> 93 N. Y. 582.



bank, who simply became liable to account for it to the other on the next settling day. It was under no obligation to pay over each specific sum received. Whether there would be anything to pay over depended upon the condition in which the account should be when the settling day arrived. This was the course of dealing agreed upon and followed between the parties for a long period, and it established between them the relation of debtor and creditor in respect to these collections."

(b) *People v. Merchants and Mechanics' Bank*.<sup>1</sup> In a somewhat similar case the Chemical Bank of New York City having received a check on a Troy bank sent it to the drawee for payment. That bank charged the check to the drawer, whose account was then good for the amount, and returned the check to the drawer. It sent a draft to the New York City bank for the amount of the check, and two days afterward closed doors before payment of the draft. After the appointment of a receiver the New York City bank applied to the court for an order requiring him to pay the draft on the ground that the assets came into his hands impressed with the trust in its favor. The order was denied. Judge Rapallo, speaking for the court, said: "There was no actual setting apart or appropriation of any specific fund or property of the bank, or of the drawer, for the payment of the check. . . The bank was simply debtor to the depositor for the balance of deposits which stood to its credit. By charging the check in account the bank reduced its indebtedness to the depositor by the amount of the check and constituted itself debtor to the holder of the check to a corresponding amount. It did not undertake to provide for the check by setting apart or appropriating any particular property or fund for that purpose, but by drawing a draft upon the Metropolitan Bank of New York, and remitting that draft. It certainly assumed the payment of the check, but there is an entire failure to show that it impressed a special trust on any of its assets for

<sup>1</sup> 78 N. Y. pp. 269, 272.

that purpose." The counsel contended that the Troy bank was agent for the Chemical Bank to receive payment of the check. "Suppose it were," continued the learned judge, "what did it receive as such payment? Simply its own obligation. If anything was set apart by charging up the check it was only so much of the bank's indebtedness to its depositor. It constituted itself debtor to the holder of the check in place of its indebtedness to its depositor. . . In paying the check the bank merely complied with its own obligation to its depositor to honor checks drawn against deposits, and if, instead of demanding immediate payment the holder of the check trusted to the bank to remit, the result was simply to give credit to the bank; not to constitute an agency."

(c) *Different rule in Wisconsin.* In Wisconsin, however, a different view has been maintained. In that State a banker who accepts a draft for collection and collects the money holds the same as trustee for the owner. Should he assign for the benefit of his creditors, the trust character of the money would not be gone notwithstanding its transfer to the assignee. And this would be so even though no portion of the money coming into his possession could be clearly traced to the person who paid the draft.<sup>1</sup>

(d) *In a case of The People v. the City Bank,*<sup>2</sup> a firm that had made a note which was to be paid there, gave a check for it, and which also directed the bank to "pay to our note due," the amount of the same. The bank charged the check to their account, and marked it "paid Nov. 3, 1882," at the same time making a corresponding entry in its books. A second note which the firm had given was treated in the same manner. The bank, however, sold the notes and received the avails from the purchaser, but the firm was ignorant of this. On the other hand, the members supposed that the bank held and owned the notes. The bank having failed, a receiver was appointed, and the question arose, should he

<sup>1</sup> *McLeod v. Evans*, 28 Northwest. Rep. 173. See § 475.

<sup>2</sup> 96 N. Y. 32.

pay these notes. The court said that the transaction in question was not between the bank and S. H. & F., who were the makers of the notes and depositors of the money, in the relation of debtor and creditor, nor in the relation of bank and depositor. "The object of the latter was to provide a fund for the payment of specific notes, and the engagement of the former was to apply that fund to such payment. Thus a trust was created, the violation of which constituted a fraud by which the bank could not profit, and to the benefit of which the receiver is not entitled.<sup>1</sup> The checks . . . were money assets in the hands of the bank, and were so treated by all parties; they were delivered to it with explicit directions to apply the proceeds on payment of the notes; those directions were assented to by the bank-officer, and the checks collected from the general fund. From that moment the bank was bound to hold the money for and apply it to that purpose and no other. . . . The bank was bailee, or trustee, but never owner. It is estopped from saying that all this is matter of book-keeping. It assumed a duty, and the receiver as its representative is bound by it. Nor does this obligation at all depend . . . upon the question, when, where, and to whom the notes were to be paid; whether presently or in the future is immaterial."

(e) *Levi v. National Bank of Missouri*<sup>2</sup> is worth mentioning. The institution received from Levi a bill of exchange "for collection and credit," and accepted from the drawee his check on a third bank for the amount, and surrendered the bill of exchange. On presenting the check, instead of demanding the money thereon, it accepted its certification as good, and suspended the same day, having previously credited Levi with the amount. The day after suspending it collected the certified check. The principal question in the case was, should Levi have the money, or should the receiver of the bank retain it for the creditors. The court decided that the bank was Levi's agent in collecting the draft, that the agency

<sup>1</sup> *Libby v. Hopkins*, 104 U. S. 303.

<sup>2</sup> 5 Dill. 104.

remained until the money was received on the check, which was after the suspension of the bank, and consequently that it received the money in trust for Levi, and that the receiver had no right to withhold it from him.

(f) In *Phelan v. Iron Mountain Bank*<sup>1</sup> an arrangement existed between the Central Savings Bank and the Iron Mountain Bank, whereby the former acted as agent of the other, in paying its checks in the clearing house. To effect this purpose, the Iron Mountain Bank kept a sufficient deposit in the Central to meet all the checks it should be required to pay. The Central Savings having failed, it returned to the other all of its deposits not used for paying its checks. The assignee maintained that the money thus paid was an illegal preference, and ought to be repaid to him by the Iron Mountain Bank. On the other hand, it refused to do so, maintaining that the relation existing between the two banks was not that of debtor and creditor, but one of trust. The court decided otherwise, and the assignee recovered the money. In general, if one has entrusted notes to a bank for collection, which at the time of insolvency it has collected but not paid over, the proceeds do not constitute a preference, and are not shared with the general creditors of the bank.<sup>2</sup>

(g) In *Farley v. Turner* the question was again asked, when has a bank so appropriated the money of a depositor to a particular purpose at his request that the law will regard the transaction with favor and complete the execution of the agreement after the bank's insolvency?<sup>3</sup> Goodwin directed the depositary to send £500, which was only a portion of his deposit at that time, to another bank to pay a bill that would soon be due. The depositary sent the money, but before the bill became due failed, and the question was whether the £500, belonged to the depositor or to the general creditors of the depositary. The court decided that though the bill had not been paid the money had been appropriated for that purpose, and consequently that it belonged to Goodwin.

<sup>1</sup> 16 N. Bank. Reg. 308.

<sup>2</sup> *Bank v. Russell*, 2 Dill. 215.

<sup>3</sup> 26 L. J., N. S. 710.

(h) *The German American Bank sent T.'s draft to the Third National Bank*<sup>1</sup> for "collection and credit." The draft was received June 19, and presented to T., who gave his check for the amount which was certified as good by the Franklin Bank, on which it was drawn, and the draft was surrendered. On the same day the defendant bank suspended payment because it was insolvent. On the 20th of June, it presented the certified check and received payment. It was decided that the defendant bank was the agent of the German American to collect the draft, that the agency continued until the money was received on the check, and that having received it after its suspension it was held in trust for the German American Bank, and could not be distributed among the creditors of the one that had failed.

(i) *Stoller v. Coates*.<sup>2</sup> In another case, the Mastin Bank of Kansas City received a draft on deposit, which was credited to the depositors. They then drew their check on the bank, with the request that it would place the proceeds of the same in the Exchange Bank of Denver, Colorado, to E.'s credit, which the Mastin Bank agreed to do. The Exchange Bank was a correspondent of the other, and the Mastin Bank gave the depositors a memorandum addressed to the Exchange Bank, stating that their account had been credited with the amount of the check to E.'s use. The memorandum was at once sent to E. by the depositors, while the Mastin Bank also sent a copy to the Exchange Bank. Before it arrived, however, the Mastin Bank had assigned for the benefit of its creditors. The Exchange Bank refused to charge the amount to the Mastin Bank, or to place it to E.'s credit, or to give him the amount in money. It was decided that the Exchange Bank having thus refused to accept the credit the fund remained in the Mastin Bank impressed with the trust, and that the relation of general creditors consequently did not exist between the depositors and the Mastin Bank.

<sup>1</sup> *German American Bank v. Third Nat. Bank*, 18 Alb. L. J. 252.

<sup>2</sup> 88 Mo. 514.

(j) *Recovery of collateral security.* So, too, if a bank receive a draft for collection accompanied with collaterals and fails before collecting it, the property may be recovered of the bank's receiver. Such an action was brought by the Corn Exchange Bank of Chicago, against the receiver of a bank at Middletown, New York, to recover the collaterals that accompanied a draft which the former bank had sent to the other for collection. The court declared it was quite apparent that the latter had no right to detain it, and that the receiver was not justified in refusing to give it up. "It did not become a part of the assets of the Middletown Bank to be distributed to its creditors, and would not except upon the payment of the lien of the drawers, who could sell it and apply the proceeds to meet the draft. It went into its possession charged with a trust which has not been performed, and never became its property."<sup>1</sup>

§ 278. **Check not credited or collected.** If a depositor cannot draw against a check until it is collected, it belongs to him in the event of the bank's failure before making the collection. In a case of this kind, the receiver having collected the money the depositor claimed that it belonged to him and not to the general creditors, because the collection was not made until after insolvency. The court decided that the check never became the property of the bank, and that the proceeds, therefore, belonged to the depositor.<sup>2</sup>

§ 279. **When creditor can retain money to complete agreement.** On the other hand, when can the creditor of a bank so appropriate its money to a particular purpose at its request that the law will regard the transaction with favor and complete the execution of the agreement after the bank's insolvency? This question was not long ago answered. An oral agreement was made in New York City in June, 1878, between the cashier of a bank in Kansas City and its correspondent banking firm in New York, that if they would

<sup>1</sup> Corn Exchange Bank v. Blye, N. Y. Sup. Ct., 2 N. Y. State Rep. 112.

<sup>2</sup> Haven's Petition, 8 Bened. 309.

accept drafts amounting to \$35,000 it would keep on deposit with the firm a balance equal to that amount until their maturity, on which the firm should have a lien with the right to charge the account at any time with the acceptances, and appropriate so much of the deposit as might be needful to pay them. The firm were advised at that time by the cashier that the bank was embarrassed, but that with this and other assistance it could live. The firm accepted the draft, the proceeds were shortly afterward deposited as agreed, and later other deposits were made by the bank. In August the bank failed, and the acceptances were immediately charged to the bank. At that time the balance in its favor was more than enough to pay the acceptances. In an action brought by the assignee to recover the money thus appropriated by the firm, it was held that the cashier had the authority to make the agreement above mentioned with the firm, and that it was not contrary to public policy to create a lien on the deposit and authorize the appropriation. Furthermore, it was not fraudulent with respect to the holders of drafts to the amount of \$40,000 drawn on the firm afterward and not accepted. The accepted drafts were without interest, and at the time of the appropriation were worth \$34,833. It was held that the right of the firm was not limited to the amount, but that the face of the drafts could be charged against the account and held to meet them when due. Judge Andrews remarked: "It is said that it constituted an unlawful preference. But the agreement of the lien was concurrent with the obligation assumed by [the firm], and was made to secure them against their liability as accommodation acceptors for the bank, assumed on the faith of the agreement. When the fund was appropriated the appropriation was made in pursuance of the original agreement as well as by the subsequent express authority of the bank."<sup>1</sup>

<sup>1</sup> *Coats v. Donnell*, 94 N. Y. 168; *Aff.* 48 N. Y. Sup. Ct. 46. In the same case it was held that in the absence of statutory restrictions a corporation has the right to prefer one creditor to another in distributing its property, and that the provisions of the New York statutes prohibiting preferences by insolvent corporations do not apply to foreign corporations.

§ 280. **Whose loss when deposit is not in real owner's name.** When a deposit is made in the name, not of the real owner but of the depositor, on whom shall the loss fall in the event of the failure of the depository. This question arose in Illinois. A person consented that a deposit should be made in his name simply to accommodate the real owner. The depositor had no control over the deposit except to draw it whenever the owner should desire. The court said that the depositor "clearly should not be made to suffer for an act of gratuitous kindness," and consequently the owner did not succeed in making another bear the loss.<sup>1</sup>

§ 281. **Depositor cannot change his relation after bank's insolvency.** When a person reaps a profit on a contract with another, he cannot abandon it to the prejudice of the creditors of the other contractor, and participate after his insolvency equally with his creditors in his estate and in opposition to the terms and effect of the original agreement. Thus, the depositor in an incorporated savings institution, requested it to convert his deposits permanently into the stock of the company. After its conversion he received increased dividends and participated in its entire profits. The institution having become insolvent, he received, like other debtors, its own certificate of deposit in payment, which would absorb all of its available funds. The depositor on the ground that a conversion of his money into stock was in violation of the charter of the company, applied for an injunction. It was decided that whether the charter authorized the conversion or not, he was not entitled to the restraining power of the court.<sup>2</sup>

§ 282. **Holders of bank-notes.** We have seen that the holders of bank-notes were often regarded as preferred creditors when the issuing bank failed; on the other hand, these could not be set off in payment of debts due to it. This question arose and was decided for the last time in Virginia after

<sup>1</sup> *Dustin v. Hodgen*, 38 Ill. 352.

<sup>2</sup> *Maryland Sav. Institution v. Schroeder*, 8 Gill & Johns. 93.



the closing of the civil war. The banks which issued notes in that State were hopelessly insolvent. They were compelled to liquidate, and an act was passed for that purpose, under which their property was conveyed to trustees for the payment of their debts. It was decided that these notes, which they had previously been required to take in payment of debts due to them, could not be bought by debtors after the conveyance of their property as above mentioned and paid to the trustees in discharge of their debts.<sup>1</sup> Judge Christian, who delivered the opinion in the latter case,<sup>2</sup> said that the whole current of decisions, with one exception, had been in one direction, namely, "that the assignees of a bank are not obliged to take from a debtor the notes of the bank obtained after notice of the assignment. This has been the uniform course of decision in New York."<sup>3</sup> And such is the uniform judgment of all the courts where this point has been adjudicated, with the exception of the Court of Appeals of the State of Maryland. That court has decided<sup>4</sup> that the assignees and trustees of an insolvent bank authorized to collect its debts and pay its creditors, are bound under the statutes of that State to receive the notes of such banks without reference to the time at which they were required. But that case is peculiar in this, that at a meeting of the Board of Directors of the bank preparatory to the execution of the deed of trust, a resolution was adopted by said board to the effect that 'the debtors of this institution should have the privilege of paying their debts in notes of that bank.' And the statute upon which the decision is founded provides for the payment of debts due to the bank, whether solvent or insolvent, in the

<sup>1</sup> *Bank v. Marshall*, 25 Gratt. 378; *Saunders v. White*, 20 Id. 327; *Exchange Bank v. Farmers' Bank*, 19 Id. 739. See § 396.

<sup>2</sup> P. 754.

<sup>3</sup> *Haxtun v. Bishop*, 3 Wend. 13; *Matter of the Receiver of Middle Dist. Bank*, 1 Paige, 585; *Diven v. Phelps*, 34 Barb. 224; *Northampton Bank v. Balliet*, 8 Watts & Serg. 311; *Housum v. Rogers*, 40 Pa. 190; *Pancoast v. Ruffin*, 1 Ohio St. 381; *King v. Elliot*, 5 Sm. & M. 428.

<sup>4</sup> *Union Bank v. Ellicott*, 6 Gill & Johns. 363.

notes of the bank, whether it is carrying on its operations as a bank or whether after the insolvency its assets have been assigned to commissioners, to wind it up for the benefit of its creditors."<sup>1</sup>

§ 283. **Savings bank depositors.** The rights of the depositors of savings banks have been well considered in four recent cases occasioned by the failure of four of these institutions.

(a) *Law in New Hampshire.* In one of them Judge Clark said :<sup>2</sup> "The assets of savings banks consist of loans of money made by them for the benefit of their depositors from whom the money was derived, and correspond to the capital stock in banks of discount, and depositors in savings banks stand in the same relation to the assets of the bank as stockholders to banks of discount.<sup>3</sup> They are the owners of the funds of the bank, entitled to share in its profits and liable to bear its losses *pro rata*, and upon the winding up of the business of the bank each depositor is entitled to his share of the assets or property remaining after the payment of the debts." Other creditors, too, share like the depositors, for example, a person who has obtained a judgment against a savings bank.<sup>4</sup> "The depositors are in fact the bank while the corporation is but an agency for receiving and loaning the money of the depositors.<sup>5</sup> And the trustees and officers of the bank are the agents of the depositors."<sup>6</sup>

<sup>1</sup> When a distribution of the assets of an insolvent bank is made in a court of equity and some of the bill-holders have paid par for their bills, and others have bought them up at a heavy discount, each will receive his part of the whole amount of the assets upon his bills in proportion to the amount he paid for them, *Belcher v. Wilcox*, 40 Ga. 391; *Collins v. Central Bank*, 1 Id. p. 461. Numerous cases relating to the set off of bank-notes have been reported more often in the Western and Southern States and especially Mississippi.

<sup>2</sup> *Cogswell v. Rockingham Ten-Cents Sav. Bank*, 59 N. H. 43.

<sup>3</sup> *Bunnell v. Collinsville Sav. Society*, 38 Conn. 203; *Simpson v. Savings Bank*, 56 N. H. 466; *Osborn v. Byrne*, 43 Conn. 155.

<sup>4</sup> *People v. Mechanics & Traders' Sav. Institution*, 92 N. Y. 7; *Rev. 28 Hun*, 375.

<sup>5</sup> *Coite v. Society for Savings*, 32 Conn. 173.

<sup>6</sup> *Cogswell v. Rockingham Ten-Cents Sav. Bank*, 59 N. H. p. 44.

(b) *When can bank and depositor's debt be set off against each other.* "The bank is not the separate and independent agent of each depositor, but the holder of a common fund in which all the depositors are interested; and since the amount which each depositor shall receive on a final distribution of the assets depends on the amount realized by the bank from its investments or debts due to it, the claim of a depositor for his share of the assets, and of the bank against him for a debt due to it, are not mutual nor in the same right, and the depositor cannot equitably set off his deposit in payment of his debt to the bank."<sup>1</sup> Nor does the pledging by the depositor of his pass-book to the bank as collateral security for a debt due from him, or in expectation at the time the debt is created that he will apply his deposit in payment, confer the right to have his deposit set off in payment of the debt. But if an agreement is made with the bank by the depositor that his deposit shall be applied next quarter-day in payment of his indebtedness to it with the understanding that the application is then made, his deposit may be set off against his debt. A special deposit of money, also, which can be withdrawn on call may be set off against the depositor's debt.<sup>2</sup> But if a person be indebted to a savings bank and deposits an amount less than the debt, intending to use the deposit in paying the debt, it can be set off against the same. In *Osborn v. Byrne*,<sup>3</sup> Park, C. J., said: "It appears in her case that she made a deposit in the bank not for the ordinary purposes of a deposit, but for the purpose, and with the intention of applying the same in payment of her indebtedness to the bank to that amount. If the officers of the bank knew for what purpose the deposit was made, although the amount has never been in fact applied in cancellation of so much of her indebtedness to the bank, we think she should be allowed to set off the

<sup>1</sup> *Hall v. Harris*, 59 N. H. 71, p. 73, citing *Osborn v. Byrne*, 43 Conn. 155; *Sawyer v. Hoag*, 17 Wall. 610; *Railroad Company v. Howard*, 7 Id. 392; *United States v. Eckford*, 6 Id. 484; *Stockton v. Mechanics & Laborers' Sav. Bank*, 32 N. J. Eq. 163.

<sup>2</sup> *Hall v. Harris*, 59 N. H. 71.

<sup>3</sup> 43 Conn. 155.

amount." A certificate of deposit of a savings institution in Tennessee was assigned by J., the holder, to W., a debtor of the bank, after its suspension and closing, but before the filing of the bill for settling its affairs as an insolvent corporation. This was declared to be a valid offset in favor of W., against the debt owing by him to the bank when sued by the receiver.<sup>1</sup>

(c) *Special deposit.* When a special deposit is received by a savings bank not in the ordinary course of business, which is appropriated, it is liable therefor, and cannot plead a want of authority in defence.<sup>2</sup>

(d) *Points decided in a New Jersey case.*<sup>3</sup> In a New Jersey savings bank case several important questions were decided which are worth stating. The bank had a special charter whereby it was authorized to receive and invest deposits for the benefit of the depositors. The income was to be divided among them after reasonable deductions for necessary expenses and the principal and interest were to be paid to the depositors, under regulations prescribed by the board of managers. They not only received deposits which participated in the profits and were payable after a thirty days' notice; but also "special deposits" which did not participate in the profits and were to be repaid to the depositors without any preliminary notice. Both kinds were mingled, so that identification was impossible, if there had been any occasion for wishing to do this. The bank having failed, the receiver asked the court for instructions. The chancellor decided: 1, that the institution was a mere trustee for the benefit of depositors;<sup>4</sup> 2, that a depositor who borrowed money from the bank secured by his note or mortgage, could not offset his debt

<sup>1</sup> Moseby v. Williamson, 5 Heisk. 278.

<sup>2</sup> Cogswell v. Rockingham Ten-Cents Sav. Bank, 59 N. H. 43.

<sup>3</sup> Stockton v. Mechanics & Laborers' Sav. Bank, 32 N. J. Eq. 163.

<sup>4</sup> Newark Savings Institution Case, 28 N. J. Eq. 552; Huntington v. Savings Bank, 96 U. S. 388; Burrill v. Dollar Savings Bank, 92 Pa. 134; Coite v. Society for Savings, 32 Conn. 173; Bunnell v. Collinsville Sav. Society, 38 Id. 203.

against the amount of his deposit at the time when the decree of insolvency was made; 3, that the so-called special depositors were not entitled to priority in payment over the other class of depositors; 4, that debts and expenses contracted by the bank in carrying on its ordinary business were to be preferred; 5, that a claim under a covenant in the lease for rent, accruing after the surrender of the premises to the lessor by the receiver could not be maintained; 6, that money paid to the bank in exchange for its check given for the accommodation of the payee which was dishonored, presumably went into the funds, and the debt should be preferred; 7, that checks given to depositors on account of deposits were not to be preferred.

(e) *Deposit claimed by assignee and by assignor's creditor.* A., a depositor in a savings bank, assigned and delivered his bank-book to B., who gave notice of the transaction to the bank. Afterwards the bank was required to appear in a suit brought against A. by a creditor. The creditor having obtained judgment, he made a demand on the treasurer of the bank who issued a new deposit-book to the creditor's attorney as trustee for A.'s deposit. The bank having failed, C. claimed to be a creditor, but the court declared that the deposit belonged to B., the assignee above mentioned, and whose title was beyond the reach of any dealings between the bank and C.<sup>1</sup>

<sup>1</sup> *Commonwealth v. Scituate Sav. Bank*, 137 Mass. 301. In New Hampshire a law exists for scaling each deposit of a savings bank whenever it has become insolvent. "It provided for a reduction of the deposit account of each depositor, so as to divide the loss equitably among the depositors. In such case when the accounts are reduced so as to equal the value of the assets, no more and no less, and the assets are divided among the depositors according to the accounts as reduced, each will receive his proportionate share of the assets, and justice will thereby be done to all the depositors. By the so-called reduction the right of the depositors to the property of the bank was not concluded nor affected, nor were they deprived of their right to an equitable share upon a division of all the assets of the bank. . . The funds being held by the bank as trustee for the benefit of depositors, the gain on the funds, as well as the funds themselves, belongs to the depositors," *Francetown Bank Case*, 63 N. H. 138.

## CHAPTER X.

## PRESENTATION OF CHECKS FOR PAYMENT.

§ 284. **Must be due diligence.** To fix the liability of the drawers and indorsers of checks they must be presented to the drawees in accordance with the rules of law. The presumption when giving a check is that the drawer will provide funds at the proper time for its payment. It is not reasonable to require him to keep funds indefinitely for that purpose at the place where the check is payable, for there is a risk in doing so, the drawee may fail and the funds be lost. It is important then to ascertain what the rules of presentation are.

§ 285. **Rule between holder and drawer.** The question of reasonable time is one of law. Furthermore, the courts very generally have determined what is a reasonable time for presenting them. The rules which apply between holder and drawer differ from those between holder and indorser and will be first given. They have been stated by the Supreme Court of Michigan in the following manner:—

(a) *When both live at same place.* If the person who receives the check and the banker on whom it is drawn are in the same place, the check must, in the absence of special circumstances, be presented the same day, or at latest the day after it is received.<sup>1</sup>

(b) *When both live at different places.* If, however, the person who receives the check and the banker on whom it is drawn are in different places, in the absence of special cir-

<sup>1</sup> *Himmelman v. Hotaling*, 40 Cal. 111; *Wear v. Lee*, 87 Mo. 358; *Simpson v. Pacific Mut. Life Ins. Co.*, 44 Cal. 139; *Cawein v. Browinski*, 6 Bush, 457; *Schoolfield v. Moon*, 9 Heisk. 171; *Alexander v. Burchfield*, 7 Man. & G. 1061; *Boddington v. Schlencker*, 4 Barn. & Ad. 752; *Moule v. Brown*, 4 Bing. N. C. 266.

cumstances the check must be forwarded for presentment on the day after it is received, at the latest; and the agent to whom it is forwarded must in like manner present it at the latest on the day after he receives it.<sup>1</sup>

§ 286. **First rule further considered.** Concerning the first of these rules, Chief Justice Nicholson, after remarking that the check is "an appropriation as between the drawer and holder to the latter of so much money in the banker's hands," continues, "the holder of the check may allow the money to remain in the banker's hands, and the drawer cannot complain unless he is injured thereby. But the risk of allowing the money to remain in the banker's hands after the ex-

<sup>1</sup> *Hare v. Henty*, 30 L. J., C. P., 302; *Prideaux v. Criddle*, L. R., 4 Q. B., 455; *Griffin v. Kemp*, 46 Ind. 172; *Woodruff v. Plant*, 41 Conn. 344; *Burkhalter v. Second Nat. Bank*, 42 N. Y. 538; *Bond v. Warden*, 1 Colly. 583; *Firth v. Brooks*, 4 Law T., N. S., 467; *Blair v. Wilson*, 28 Gratt. 165. "If payment is not thus regularly demanded," said Judge Lumpkin, "and the bank or bankers should fail before the check is presented, the loss will be the loss of the holder, who will make the check his own, at his sole risk, by his laches. The reason for this strictness is said to be that a check, unlike a bill of exchange, is generally designed for immediate payment, and not for circulation, and therefore it becomes the duty of the holder to present it for payment as soon as he reasonably may, and if he does not, he keeps it at his own peril," *Daniels v. Kyle*, 5 Ga. 245; *Himmelman v. Hotaling*, 40 Cal. 111.

"The law is well settled that all drafts, whether foreign or inland bills, must be presented to the drawee within a reasonable time, and in case of non-payment notice must be given promptly to the drawer to charge him. But what is a reasonable time under all the circumstances, is sometimes a most difficult question. The general doctrine is each case must depend on its own peculiar facts, and be judged accordingly," *Montelius v. Charles*, 76 Ill. 303; *Stevens v. Park*, 73 Id. 387. In the absence of any qualifying circumstances the holder should present the bill to the person or bank on which it is drawn, if within reach of such drawee, within business hours of the day next succeeding the receipt of the paper and give notice of the dishonor to the drawer, *Bickford v. First Nat. Bank*, 42 Ill. 238; *Strong v. King*, 35 Id. 9. "This rule applies to bank checks as well as to bills of exchange, strictly so called. But in case of either the rule is modified to a limited degree by the relations of the parties, their circumstances, manner of doing business, and facilities for making prompt presentation of the paper for payment," *Bailey, J., Allen v. Kramer*, 2 Brad. p. 209. But the court did not distinguish between checks drawn in the same town and those out of town.

piration of the banking hours of the day after the check is drawn rests upon the holder of the check."<sup>1</sup>

§ 287. **Second rule.** (a) *Little v. Phenix Bank.*<sup>2</sup> In applying the second rule it was held that the holder of a negotiable check payable on demand, drawn in New York on a bank in Mississippi, and presented for payment more than ten months after its date and refused (the bank having suspended payment a few days before presentation, and owing the drawer), could not recover against him, as the loss had been sustained in consequence of the delay to present the check for payment.

(b) *Cox v. Boone.*<sup>3</sup> On the evening of the 22d of February, J. delivered to C. a check drawn on the Wheeling Savings Institution. C. resided fifteen miles from Wheeling, and his nearest post-office was three miles away. The mail from there was tri-weekly, closing at half-past seven in the morning on Tuesday, Thursday, and Saturday, and arriving at Wheeling before twelve. The bank was in truth insolvent

<sup>1</sup> *Schoolfield v. Moon*, 9 Heisk. p. 173. In New York, Judge Miller has remarked on the abundance of the authorities that the holder of a check has the day after it is delivered to make a presentment for payment, *Syracuse, Bing. & N. Y. R. Co. v. Collins*, 3 Lans. p. 31 (aff. in 57 N. Y. 641), citing *Kelty v. Second Nat. Bank*, 52 Barb. 328; *Johnson v. Bank*, 5 Robt. 554; *Hazleton v. Colburn*, 1 Id. 345; S. C., 2 Abb. Pr., N. S., 199; *Merchant's Bank v. Spicer*, 6 Wend. 443; *Mohawk Bank v. Broderick*, 13 Id. 133; Aff. 10 Id. 304. In *Cawein v. Browinski*, 6 Bush, 457, the drawer of the check on the day of drawing it had more than enough money on deposit to pay it, the bank promptly paid all checks on that day, the check in question was drawn at half-past twelve o'clock, the drawer, drawee, and payee resided in the same city. If presented on the day of delivery it would probably have been paid, but that evening the bank closed forever. The payee took it to the bank the next day and demanded payment, on refusal of which he sued the drawer and recovered.—The holder of a check on a drawee bank in the same town may present it for payment at any time the day after it is drawn, and his omission to do so sooner is no defence to the bank unless he had information of its precarious condition, *Bank v. Alexander*, 84 N. Car. 30.—When a check was drawn at two o'clock on Saturday afternoon and presented for payment at eleven o'clock on Monday forenoon, the drawee was not discharged, although his place of business was only eighty feet distant from the holders, *O'Brien v. Smith*, 1 Black (U. S.), 99. See § 67.

<sup>2</sup> 2 Hill, 425.

<sup>3</sup> 8 W. Va. 500.



before the 22d of February, but continued to pay depositors until Saturday noon, the 25th, when it failed and closed its doors. It was decided that C. was not required to mail the check to his agent or banker at Wheeling, for presentment, on the day he received it; nor to mail it on the morning of the 23d in time for the half-past seven mail, as that was an unseasonable hour at that season of the year, that he was not negligent in delaying presentation before the failure of the bank, nor was J. prejudiced by his conduct.

(c) *In Woodruff v. Plant*,<sup>1</sup> Judge Foster has remarked that "what is a reasonable time will depend upon circumstances, and will, in many cases, depend upon the time, the mode, and the place of receiving the check, and upon the relations of the parties between whom the question arises." Thus, W. desiring to make a remittance to a creditor at a distance asked P., who had an account with the banker in another place, to give him his check in exchange for bank bills, which he did. P. knew why W. desired the check, and that several days would elapse before it would reach the drawee. W. indorsed the check to his creditor and sent it by the next mail. When the check reached the drawee three days afterward, he had failed and payment was refused. W. having sued P. on the check, it was decided that the presentment was within a reasonable time and that he was liable.

(d) *Freiberg v. Cody*.<sup>2</sup> A check for a small sum was given late in the afternoon at a lumber camp twenty miles from the bank to a merchant whose place of business was twenty-seven miles by rail in another direction; and who had to be there on the following day, which was Saturday. On Monday he left the check at the local bank for collection, but the other bank failed early that day. It was held that the delay in presenting the check for payment was not such as would release the debt for which it was given.

(e) *Werk v. Mad River Valley Branch Bank*.<sup>3</sup> A., of Cincinnati, who was indebted to B. & Co., of Springfield, Ohio,

<sup>1</sup> 41 Conn. 344.

<sup>2</sup> 55 Mich. 108.

<sup>3</sup> 8 Ohio St. 301.

forwarded to them by mail, at their request, on Saturday, his check of that date drawn on a Cincinnati bank. The check was received by B. & Co. by due course of mail on Monday morning and was mailed on the following day by the holder to a bank in Cincinnati to be collected. It was received there in due course of mail on Thursday morning, and presented for payment on the same day. This was not such a want of reasonable diligence as to discharge the drawers. On the other hand, "a higher degree of diligence could not reasonably have been expected by the drawers," nor was required by the rule applicable to such a case.

§ 288. **Drawer can extend the time.** "That the time for presentment may be extended by the assent of the drawer, express or implied," said Judge Foster,<sup>1</sup> "is well settled."<sup>2</sup> Here the time for presentment was extended by the assent of the drawer, though not for a definite time." "Nothing is plainer than that the time may be extended by the assent of the drawer, express or implied."<sup>3</sup> And in *Compton v. Gilman*<sup>4</sup> Judge Patton has remarked that "while it is settled that a check should be presented promptly to the bank for payment, otherwise the drawer will not be responsible, and no action can be maintained against him upon the check, it is equally well settled that the necessity for such presentment may be waived by the representations and conduct of the drawer. What representation and conduct are sufficient to dispense with the prompt presentation of the check are matters of fact to be determined under the circumstances of each case."<sup>5</sup>

§ 289. **Drawer not exonerated by delay.** Although it is the duty of the holder to present his check to the drawee in accordance with the foregoing rules, yet if he neglect to do

<sup>1</sup> *Woodruff v. Plant*, 41 Conn. 344.

<sup>2</sup> *Alexander v. Burchfield*, 7 Man. & G. 1061.

<sup>3</sup> *Champlin, J., Holmes v. Roe*, 28 Northwest. Rep. 864.

<sup>4</sup> 19 W. Va. 312, p. 316.

<sup>5</sup> *Devendorf v. West Virginia Oil & Oil Land Co.*, 17 W. Va. 135; *Commercial Bank v. Hughes*, 17 Wend. 94; *Franklin v. Vanderpool*, 1 Hall, 78; *Cox v. Boone*, 8 W. Va. 500.

so, the drawer is not exonerated from payment unless he can prove an injury from the delay. "The rule is settled," says Judge Miller,<sup>1</sup> "that in case of a check, the drawer is to be treated the same as a principal debtor, and he is not discharged by any laches [or negligence] of the holder in not making due presentment thereof, or in not giving him notice of dishonor, unless he has suffered some loss or injury thereby and then only *pro tanto*.<sup>2</sup> It must, however, be made to appear that no damage or injury was caused in consequence of the omission."<sup>3</sup> The drawee of a negotiable check is not discharged from liability by the delay of the holder to make presentment and give notice of his dishonor, unless he has suffered loss thereby, and then only *pro tanto*. If the drawee remains solvent and the fund on which the check is drawn is unaffected by the delay, the liability of the drawee continues in full force. The *bona fide* holder is not affected by secret equities existing between antecedent parties.<sup>4</sup>

§ 290. **What causes excuse presentation.** As between the drawer and holder, therefore, if the former has not sustained injury by delay in presenting and demanding payment of his check, he will not on that ground be exonerated from paying it. In applying the principle the question is, has the drawer suffered from delay in presenting his check? Putting the question in another form, when is the holder excused from not presenting a check to the drawee as the foregoing rules require?<sup>5</sup>

<sup>1</sup> Syracuse, Bing. & N. Y. R. Co. v. Collins, 3 Lans. p. 32.

<sup>2</sup> Citing Harbeck v. Craft, 4 Duer, 122.

<sup>3</sup> Commercial Bank v. Hughes, 17 Wend. 94; Little v. Phenix Bank, 2 Hill, 425; Murray v. Judah, 6 Cow. 484; Gough v. Staats, 13 Wend. p. 552, citing Rickford v. Ridge, 2 Camp. 537; Robson v. Bennett, 2 Taunt. 389; Beeching v. Gower, 1 Holt, 313; Cromwell v. Lovett, 1 Hall, 56; Woodin v. Frazee, 38 N. Y. Sup. Ct. 190; Church v. Farnham, 1 Sheld. 393; Scott v. Meeker, 20 Hun, 161.

<sup>4</sup> Stewart v. Smith, 17 Ohio St. 82.

<sup>5</sup> Elting v. Brinkerhoff, 2 Hall, 459; Hoyt v. Seeley, 18 Conn. 353; Smith v. Jones, 2 Bush, 103; Cawein v. Browinski, 6 Bush, 457; Piner v. Clary, 17 B. Mon. (Ky.) 645; Emery v. Hobson, 63 Me. 32; Cogswell v. Rockingham

**First.** *When drawer has no funds.* In the first place he is excused when the drawer has no funds with the drawee to pay it. In the words substantially of Judge Christian, in *Bell v. Alexander*:<sup>1</sup> "When the drawer at the date of the check, or at the time of the presentment of it for payment, has no funds in the bank, or if, after drawing the check, and before its presentment for payment or dishonor, he has withdrawn his funds, the drawer remains liable to pay the check, notwithstanding the lapse of time." In another case the holder of a bank check did not present it for payment until more than two years after receiving it, omitting meanwhile to give any notice to the drawer of non-payment. The drawer in truth never had funds in the bank sufficient for the payment of the check before it was protested, except at one time, and then they were immediately drawn by himself. The bank was not insolvent and the drawer sustained no loss or injury from the delay in the presentment or by the want of notice of non-payment. It was held that neither the delay in the presentment nor the notice of non-payment<sup>2</sup> exonerated the drawer from liability.<sup>3</sup>

**Second.** *When funds are withdrawn.* (a) *Deener v. Brown*.<sup>4</sup>

Ten-Cents Sav. Bank, 59 N. H. 43. In *Jones v. Heiliger*, 36 Wis. 149, the payee presented the check on the next business day after receiving it, and the day afterward notified the drawer of its dishonor and of his liability thereon. This was held to be due diligence in the absence of any proof that the drawer was injured by the delay, especially as it appeared that when the check was given the drawee had already suspended payment.

<sup>1</sup> 21 Gratt, 1, p. 6.

<sup>2</sup> If the maker of a check payable instantly has no funds at the time in the bank in which it was drawn, the check while unexplained is regarded as a fraud, and the holder can sustain an action thereon, without presenting the same, or giving notice, *True v. Thomas*, 16 Maine, 36. "A check drawn upon a bank in which the drawer has no funds need not be presented at all in order to sustain an action upon it," *Foster v. Paulk*, 41 Maine, p. 428; *Franklin v. Vanderpool*, 1 Hall, 78. When the maker of a check has no funds in the bank on which it is drawn he is not entitled to notice of protest, *Fitch v. Redding*, 4 Sand. 130; *Sterrett v. Rosencrantz*, 3 Phila. 54. See § 73.

<sup>3</sup> *Hoyt v. Seeley*, 18 Conn. 353; *Shafer v. Maddox*, 9 Neb. 205.

<sup>4</sup> 1 MacArthur, 350. "If a check is made upon a supposed depository and the drawer had no funds and made no provision to meet the check, or had

If the maker should withdraw from the bank his entire deposit against which a check is drawn, he is not injured by delay in presenting it, nor by lack of formal notice of its non-payment before an action is brought thereon.<sup>1</sup> In one instance a person drew his check for the accommodation of B. who transferred it to D., but who did not present it for payment for more than five months. When he did so the drawer had no funds in the bank, though he had had for three months or more, and if the check had been presented during that period it would have been paid. Having been sued, the drawer claimed that he was discharged in consequence of the holder's delay in presenting it for payment. The court said: "By the check he had appropriated its amount to this holder and had no right to withdraw it afterward. The delay in presenting the check was at the risk of the holder. If the bank had failed the loss would have been his. But the money so set over was afterward withdrawn by the drawer of the check himself, and thus, after having taken the money, he is now attempting to throw the loss on the party whose money he unjustly appropriated." He therefore was liable.

(b) *If bank refuse to pay what holder must show.* If a bank refuse to pay a check on the ground of inadequate funds, the holder must show that at the time of presenting it for payment the bank had enough on deposit to the drawee's credit to pay the check. It is not enough to show that the drawer made adequate deposits on the same day as they may have been made subsequent to the presentment of the check.<sup>2</sup>

(c) *St. John v. Homans.*<sup>3</sup> On the 16th of February, 1842, A. drew his check on the Bank of Missouri for \$1000. On

drawn them out, he will not be permitted to take advantage of want or diligence in its presentation. To do it would enable him to work a fraud, to pocket his original money and the consideration of the check." Bliss, J., in *Moody v. Mack*, 43 Mo. 210.

<sup>1</sup> *Emery v. Hobson*, 63 Me. 32.

<sup>2</sup> *International Bank v. Jones*, 15 Brad. 594; see *Richardson v. International Bank*, 11 Id. 582.

<sup>3</sup> 8 Mo. 382.

the 24th of the same month it was presented<sup>1</sup> for payment, which was refused except in bills of the State Bank of Illinois. At the time the check was drawn, A. had on deposit in the bank \$1702.69 in bills of the other. On the 27th of the same month he withdrew his deposits, they having depreciated in value between the delivery of the check and its presentment for payment. All of the parties resided in St. Louis. It was decided that the holder could not, under the circumstances, recover the check from the drawer.

**Third. *Insolvency of drawee.*** The insolvency of the drawee within the time given to the holder for making presentment, will excuse him from doing this. Thus, C. offered to pay on account, to his creditor's agent in money, but at the latter's request gave him a check which was drawn on a bank in which he had a sufficient deposit. The bank paid drafts as appeared subsequently on the same day and during an hour on the morning of the succeeding day; it then became insolvent, and fifteen days afterward was declared a bankrupt. No presentation of the check was made at the bank or demand of payment on C., nor did he have notice of non-payment until two weeks after the delivery of the check. Nevertheless, the principal recovered.<sup>1</sup> When one knowingly draws his check on a bank which is insolvent and cannot pay, but which if solvent, and able to pay, is not indebted to him even on a balance of account, he is not in a condition to be injured by failure to receive notice of dishonor.<sup>2</sup>

(a) *Morrison v. McCartney.*<sup>3</sup> The 2d of October, A. drew a check on B. a banker, in favor of C., who, on the same day transferred it to D. The next day B. suspended payment. On the 6th of October, A., who had previously begun suits by attachment against B. to recover the amount of his deposits, compromised them and received the same. The check was not presented until nearly the end of January, the follow-

<sup>1</sup> Syracuse, Bing. & N. Y. R. Co. v. Collins, 3 Lans. 29.

<sup>2</sup> Warrensburg Co-operative Build. Ass'n v. Zoll, 83 Mo. 94.

<sup>3</sup> 30 Id. 183.

ing year, when payment was refused. The check was duly protested and notice was given. In a suit by D. the holder, against A. the drawer, the latter was not discharged by the delay.

**Fourth.** *When usage is followed.* "The holder of a check is in the exercise of due diligence when he presents it for payment in accordance with the usage of the bank in the place where it is made payable, and of the persons who have accounts with such banks, provided such usage is well established, lawful and reasonable in its character, uniform and general in its application, known and recognized by the mercantile and trading community, and by the parties to the check. When such a usage exists, those who make contracts within its purview are presumed to have made them with reference to it; and it is deemed to form a part of their contracts, as much so as though it were actually incorporated into them."<sup>1</sup>

(a) *Marrett v. Brackett.*<sup>2</sup> The foregoing principles were applied in the following case: A well-known usage existed among the banks in Portland, Maine, where all checks were exchanged at a "clearing house" held every morning by the clerks representing each bank. The exchange included only checks held by each bank at the close of the previous day's business; and each bank receiving checks from the clearing house, had the right by usage, immediately to return those which were not covered with deposits. Persons also having bank accounts deposited in their own bank checks received by them on any other. The deposit was made on the day of receiving the check if in time to do so, but if the bank was closed, the check was deposited the next day. M., who resided in Portland, was the holder of a note against B., and requested its payment. B. sent C.'s check, which was duly received, but too late for deposit on the same day. This, however, was done the next day, and on the morning of the

<sup>1</sup> Dickerson, J., *Marrett v. Brackett*, 60 Me. p. 527.

<sup>2</sup> 60 Id. 524.

third, it was presented for payment through the clearing house, but was not paid because C. had failed. M. then brought a suit against B. on the note, and recovered, the court declaring that the taking of the check was not payment, and, furthermore, that the plaintiff was not negligent in presenting the check by agreement of the parties as interpreted by the usage in making presentment.<sup>1</sup>

(b) *So in Hooker v. Franklin*,<sup>2</sup> it was held that a bank is not negligent in presenting the check of a depositor for payment on the following day, if this be the usage of business. Hence, in such a case, if the check be not paid when presented after due notification of presentment and refusal of the drawee to pay, the depositor is liable thereon, although the drawer had enough funds in the bank on which it was drawn during the day it was deposited and subsequently.

(c) *Usage not universal.* But usage or custom does not affect the rules of presentment so much everywhere. Thus, in Missouri, the custom of banks in making payments through the clearing house does not alter the rule that a check must be presented to the bank on which it is drawn, at least during banking hours of the next succeeding business day.<sup>3</sup>

<sup>1</sup> *Williams v. Gilman*, 3 Green. 276; *Leach v. Perkins*, 17 Me. 462. Judicial notice must be taken of the ordinary rules and necessities of banking business. "Banks have a right to expect their depositors to know these usages and to conform to them. And they have a right to rely to a reasonable extent on the presumption that their customers are thus dealing with them." *American Nat. Bank v. Bushey*, 45 Mich. 135, p. 140. "Where the law requires a certain thing to be done contract or usage may omit it by providing a substitute. But if the thing required be done, there is of course, no need for the substitute." When there has been due presentment of a check to the drawee and payment demanded and refused, the drawer, if otherwise liable, is not discharged because of a failure to present the check at the clearing house, in accordance with a mercantile usage, though it would have been paid had it been so presented, *Kleekamp v. Meyer*, 5 Mo. App. 444.

<sup>2</sup> 2 Bosw. 500.

<sup>3</sup> *Rosenblatt v. Haberman*, 8 Mo. App. 486; *Alexander v. Burchfield*, 1 Car. & M. 75; S. C., 7 Man. & G. 1061; *Holmes v. Roe*, 28 Northwest. Rep. 864; *Davis v. Benton*, 2 West. L. Mo. 434; see *Merchants' Nat. Bank v. Procter*, 1 Cin. S. C. Rep. 1. See § 426, note.



**Fifth.** *When prevented by extraordinary causes.* When the holder of a check is prevented by a state of things beyond his control from presenting or sending it to be presented for payment, the delay is excused. But when the delay is for three months or more the reason must be shown. The requirement of due diligence of the holder will not be evaded by showing that the drawer had no funds in the hands of the drawee, unless it be made to appear that this want of them was the result of some fraudulent act of the drawer or indorser. If the maker or indorser has been guilty of some fraudulent act concerning the check, for example, in not having funds in the hands of the supposed depository, and has made no provision to meet his check or has fraudulently withdrawn his funds before the presenting of it, he cannot avail himself of the negligence of the payee or holder as a defence against the check.<sup>1</sup>

(a) *Removal of bank.* If the holder of a check be not able to present it by reason of the removal of the bank and the condition of the country, he should give notice of the fact to the drawer and offer to return it. And if he fail to do so the drawer is not liable.<sup>2</sup> If the holder of a check be disabled so that he cannot go in person to present the check for payment, yet if he can send it by mail he will not be excused for not presenting it.<sup>3</sup>

§ 291. **Presentation affected by agreement.** If it is agreed to send a check to another city to be cashed, the drawer will remain liable if presentation for payment be made within a reasonable time.<sup>4</sup> And if the drawer of a check stop payment of it, he is not entitled to notice of non-payment;<sup>5</sup> but the payee cannot sue on the original cause of action without accounting for the check.<sup>6</sup>

<sup>1</sup> *Moody v. Mack*, 43 Mo. 210; *Linville v. Welch*, 29 Id. 203; *Adams v. Darby*, 28 Id. 162; *Morrison v. McCartney*, 30 Id. 183.

<sup>2</sup> *Purcell v. Allemong*, 22 Gratt. 739.

<sup>3</sup> See *Bell v. Alexander*, 21 Gratt. 1.

<sup>4</sup> *Stephens v. McNeill*, 26 Barb. 651.

<sup>5</sup> *Purchase v. Mattison*, 6 Duer, 587; *Jacks v. Darrin*, 3 E. D. Smith, 548.

<sup>6</sup> *Woodin v. Frazee*, 38 N. Y. Sup. Ct. 190.

§ 292. **Effect of drawee's direction.** If a bank direct that checks drawn thereon be presented for payment to another bank, and the holder of a check complies with the direction, and payment be refused, the drawer is discharged whenever notice of non-payment is not given, though the check be presented to the drawees on the following day.<sup>1</sup>

§ 293. **Presentation by public officer.** If a public officer, a county treasurer, for example, receive from the State treasurer a bank check he must present it within a reasonable time, like any other holder, and if he neglect to do this and the bank fails and a loss is incurred he can be held therefor.<sup>2</sup>

§ 294. **Effect of acceptance on sureties.** The accepting of a check by writing the word "accepted" thereon and by paying part of the amount is not such a change of the instrument as to work a discharge of the drawer and its sureties. This would be the case if the acceptance were conditional, fixing some other time or mode of payment than is implied in the language and terms of the check.<sup>3</sup>

§ 295. **Presentation through mail.** If the holder sends a check by mail to the drawee for collection he makes the drawee his agent, and must bear any loss arising after the time when the check could have been presented by express or other usual method.<sup>4</sup>

§ 296. **Holder must prove no loss by delay.** Though delay in presenting a check will not discharge the drawer unless he has been injured, the holder in such a case is obliged to show affirmatively that no loss has happened to the drawer.<sup>5</sup>

§ 297. **Not dishonored by delay in presentation.** Although payable on demand, checks are not regarded as dishonored or overdue on the day or immediately after the day of their date.

<sup>1</sup> East River Bank v. Gedney, 4 E. D. Smith, 582.

<sup>2</sup> State v. Gates, 67 Mo. 139.

<sup>3</sup> Warrensburg Co-operative Build. Ass'n v. Zoll, 83 Mo. 94; Taylor v. Newman, 77 Id. 265.

<sup>4</sup> Farwell v. Curtis, 7 Biss. 160.

<sup>5</sup> Little v. Phenix Bank, 2 Hill, 425; Griffin v. Riblet, 6 N. Y. Leg. Obs. 421; Willits v. Payne, 43 Ill. 432; Stevens v. Park, 73 Id. 387.

"A holder who takes a check in good faith and for value several days after it is drawn, receives it without being subject to defences of which he has no notice before or at the time his title accrues. This is the rule of law as settled by uniform practice and the current of decisions in the courts of the United States."<sup>1</sup> Hence a check thus taken ten days after it was drawn was not subject to defences of which the taker had no notice before receiving the check. And when a check on a Boston bank was sent from that place by mail to Rochester, New York, and brought there four days afterward, and two days later was presented for payment, the check was regarded as not subject to equities that might exist between the original parties.<sup>2</sup>

(a) *Unless kept very long.* "A check may be retained so long after its date, without presentation, as to cast discredit on it," says Chief Justice Mercur. On one occasion a check was drawn and delivered on Tuesday or Wednesday. The drawer, having no money at the time, requested the payee to hold it until the following Monday or Tuesday, or three days after its date; the payee passed it to another person for a valuable consideration. This was regarded not long enough to put the holder on inquiry with respect to the consideration for the check.<sup>3</sup>

(b) *Remarks of Woodward, J.* Again, Judge Woodward in the well-considered case of *Lancaster Bank v. Woodward*,<sup>4</sup> has remarked that "checks are no doubt often negligently retained and presented long after they should be; but when a bank sees that a customer appointed a day in his check for its payment, that that day has long since passed, and that no funds have been deposited to meet it, the bank must be held to the rule in regard to overdue paper, and be presumed to

<sup>1</sup> Bigelow, C. J., in *Ames v. Meriam*, 98 Mass. 294, p. 296, citing, *In re Brown*, 2 Story, 502.

<sup>2</sup> *First Nat. Bank v. Harris*, 108 Mass., 514; see *Stewart v. Smith*, 17 Ohio St. 82. See § 61.

<sup>3</sup> *Laber v. Steppacher*, 103 Pa. p. 83; *Walker v. Geisse*, 4 Whar. p. 256.

<sup>4</sup> 18 Pa. 357, p. 361.

have taken it on the credit of the indorser." In that case the maker of the check paid it to the holder the day before the time appointed for payment. "As he had no funds in the Lancaster Bank when he drew the check he was bound to place them there before it became payable, or pay the amount directly to the holder." He chose the latter alternative, but did not require the delivery of the check to himself as he ought to have done. More than a year after the date of payment and actual discharge of the same, the Lancaster Bank received it from the Penn Township Bank. Two days afterward the Lancaster Bank paid it, or rather placed it to the credit of the other, and subsequently claimed "to have been an innocent indorsee without notice." It was declared that these circumstances were sufficient to put the bank on inquiry, and therefore it could not thus be regarded.

§ 298. **Release of drawer by tendering payment.** "The presenting of a check for payment implies that the holder of it desires and is ready and willing to accept payment. . . If he should present it for the sole purpose of ascertaining whether the signature was genuine, or whether the drawer had funds to his credit, or merely for the purpose of being identified as the person entitled to payment, not intending then to present it for payment, it is clear that this would not constitute a demand of payment, which in its very nature imports willingness on the part of the holder to accept the money at that time. But if the check is presented for payment with the present intention in the mind of the holder to accept the money if tendered, this must be deemed to be a demand of payment for all purposes affecting the rights of the drawer, even though the holder should afterward change his purpose and decline to accept the money when tendered by the bank. Having once demanded payment in due form and within the proper time, and the bank being then and there ready and willing and offering to pay the check, the holder is not at liberty after this to retract or waive his demand and decline to accept payment without thereby releasing the drawer from further liability on the check. If the holder declines to accept pay-

ment when it is tendered on a proper demand, the liability of the drawer ceases, for the reason that his undertaking was that the check would be paid when payment should be first demanded in due form and within the proper time; but he does not undertake that it will be paid on a second demand when payment has been tendered and refused on a prior demand made in due form and within the proper time.”<sup>1</sup>

§ 299. **Presentation of irregular check.** If an instrument be not a check, though having the proper form, because it is not payable in lawful money, presentment should be made and notice given to the drawer in the event of non-payment, but protest is not necessary.<sup>2</sup> But a check given for borrowed money and held as evidence of the loan, need not be presented to the drawee.<sup>3</sup>

§ 300. **Presentation by porter.** The delivery of a bank check by one bank to the porter of another on which it is drawn, and the return of the same as not good, accompanied by evidence of the invariable practice of the porter to present checks thus received, and to return them if dishonored on the same day that they are delivered to him is sufficient proof of presentment to satisfy the law.<sup>4</sup>

§ 301. **Indorsed check.** (a) *Must be presented in reasonable time.* As between the holder of a check and an indorser or third person, payment must be demanded in a reasonable time.<sup>5</sup> Said Judge Sutherland in *Gough v. Staats*:<sup>6</sup> “Where there is no dispute about the facts whether the presentment is within a reasonable time or not is a question of law and must in some degree depend upon the particular circumstances of each case. Where there are no peculiar circumstances in the case, the rule seems to be settled that no laches can be imputed to the holder if the check is presented on the day next after

<sup>1</sup> Crockett, J., *Simpson v. Pacific Mutual Life Ins. Co.*, 44 Cal. 139, p. 143.

<sup>2</sup> *Bank of Mobile v. Brown*, 42 Ala. 108.

<sup>3</sup> *Currier v. Davis*, 111 Mass. 480.

<sup>4</sup> *Merchants' Bank v. Spicer*, 6 Wend. 443.

<sup>5</sup> *Cogswell v. Rockingham Ten-Cents Sav. Bank*, 59 N. H. 43.

<sup>6</sup> 13 Wend. p. 552.

that on which it was given.”<sup>1</sup> In *Mohawk Bank v. Broderick*,<sup>2</sup> Chief Justice Savage, after quoting with approval from the opinion of the court in another case,<sup>3</sup> that “checks are considered as having the character of inland bills of exchange, and the holder thereof, if he would preserve his right to resort to the drawers and indorsers, must use the same diligence in presenting them for payment, and in giving notice of the default of the drawee, that would be required of him as the holder of an inland bill,” continues: “With regard to inland bills of exchange and promissory notes payable on demand, the only rule as to when payment must be demanded is that it must be done within a reasonable time. What shall be deemed a reasonable time must in some measure depend on the circumstances of each particular case. In this court, whether the presentment is made within a reasonable time is held to be a question of law, where there is no dispute about facts, in some other courts it is held to be a question for the jury.” After reviewing several cases he concludes: “The true rule undoubtedly is that a check, to charge an indorser, must be presented with all the dispatch and diligence which is consistent with the transaction of other commercial concerns.”<sup>4</sup> Hence, when a check was received on the 14th of January drawn on a bank sixteen miles from the receiver’s residence, between which places there was a daily mail, and it was not presented until February 6th, the holder was declared to be negligent in presenting the check and the indorser was discharged.<sup>5</sup>

<sup>1</sup> Citing *Rickford v. Ridge*, 2 Camp. 537; *Robson v. Bennett*, 2 Taunt. 389; *Beeching v. Gower*, 1 Holt. 313; *Cromwell v. Lovett*, 1 Hall, 56.

<sup>2</sup> 10 Wend. p. 307.

<sup>3</sup> *Merchants’ Bank v. Spicer*, 6 Id. p. 445.

<sup>4</sup> “As it is one of the peculiar characteristics of a bank check that it has no days of grace, it is necessarily due as soon as it is drawn and delivered to the payee or holder. As between the holder and indorser, therefore, the holder is bound to present it for payment immediately or at least within a reasonable time, according to the relative localities of the parties, otherwise the indorser ceases to be liable,” Chief Justice Nicholson, *Schoolfield v. Moon*, 9 Heisk. 171, p. 174.

<sup>5</sup> *Mohawk Bank v. Broderick*, 10 Wend. 304, also on appeal, 13 Id. 133.

(b) *Three days too late.* In another case in which all the parties to a check lived in the same place the omission for six days to present it for payment discharged the indorser.<sup>1</sup> So likewise a check dated and drawn on a bank in Boston and presented three days afterward, was presented too late to charge the indorser.<sup>2</sup>

(c) *Post-dated check, and check due Sunday.* With respect to a post-dated check, presentation will be sufficient if made within a reasonable time to charge the indorsers.<sup>3</sup> If due on Sunday, the presentation should be made on the following day; if done on Saturday this would not be valid.<sup>4</sup>

(d) *Indorser discharged though not injured.* Although the indorser may not have been injured by the delay in presenting it within a reasonable time, yet he is discharged. "The law presumes he has been prejudiced, and therefore his liability cannot be continued."<sup>5</sup> The indorser of a check drawn for his accommodation, and who is bound to provide to meet it, is not entitled to notice of non-payment.<sup>6</sup>

§ 302. **Notice.** The next point to be considered is the notice. As a bank check is essentially the same thing as a domestic bill of exchange it is governed by the same laws with respect to notice.<sup>7</sup>

(a) *To drawer without funds.* If the drawer has no funds at the drawee's to pay his check he is not entitled to notice of non-payment, nor is he discharged by its non-presentation within a reasonable time.<sup>8</sup> The reason for the rule, as stated long ago by Mr. Justice Buller, is that the drawer could not be injured by want of notice.<sup>9</sup>

<sup>1</sup> Gough v. Staats, 13 Wend. 549.

<sup>2</sup> Veazie Bank v. Winn, 40 Maine, 60.

<sup>3</sup> Middletown Bank v. Morris, 28 Barb. 616.

<sup>4</sup> Salter v. Burt, 20 Wend. 205.

<sup>5</sup> Gough v. Staats, 13 Id. 549; Murray v. Judah, 6 Cow. 484; Cruger v. Armstrong, 3 Johns. Cas. 5; Conroy v. Warren, Id. 259; Aymar v. Beers, 7 Cow. 705.

<sup>6</sup> Williams v. Hood, 1 Phila. 205.

<sup>7</sup> Shrieve v. Duckham, 1 Littell, 194; Humphries v. Bicknell, 2 Id. p. 299.

<sup>8</sup> Eichelberger v. Finley, 7 Harris & Johns. 381.

<sup>9</sup> Bickerdike v. Bollman, 1 Term, 405.

(b) *To drawer with funds.* But if the drawer has funds in the bank, he is entitled to notice of non-payment.<sup>1</sup> Mere delay, too, in giving notice to him of dishonor does not discharge him, but he is entitled to whatever damages he may have sustained.<sup>2</sup> When a check has been presented and payment has been refused, and notice of non-payment duly given, the drawer is as much liable thereon as he would be on a bill of exchange. The holder can sue on this or on the debt for which the check was given in payment.<sup>3</sup>

(c) *To indorser.* To charge an indorser with notice of presentation and protest, the notary must direct his notice to the indorser at his proper post-office address, whenever this is done by the use of the mail, otherwise the indorser is discharged.<sup>4</sup>

A check drawn on Sunday, but with the date of the next day, and delivered on Sunday, was regarded as dated on Monday, and consequently all of the next day was left to send it by mail.<sup>5</sup>

<sup>1</sup> *Flemming v. Denny*, 2 Phila. 111.

<sup>2</sup> *Henshaw v. Root*, 60 Ind. 220 ; *Griffin v. Kemp*, 46 Id. 172.

<sup>3</sup> *Henshaw v. Root*, 60 Ind. 220 ; *Griffin v. Kemp*, 46 Id. 172.

<sup>4</sup> *Northwestern Coal Co. v. Bowman*, 28 Northwest. Rep. 496. In *Daniel on Negotiable Instruments*, the cases are collected relating to notes, § 1022.

<sup>5</sup> *Braun v. Kimberlin*, Hamilton Co. Dis. Ct., Ohio, 9 Rec 405.



## CHAPTER XI.

## IN WHAT MONEY SHALL DEPOSITS BE PAID.

FORMERLY, when the State banks issued notes which circulated as money and which were of varying value, the question, in what money or funds should a deposit or check be paid frequently arose. A second class of questions was occasioned by the events of the civil war, beside the issue of legal tender notes by the national government. Last, there is another class of questions, of a more permanent nature, with which we will begin the chapter.

§ 303. **Counterfeit notes.** One of these questions relates to the receiving of a counterfeit note from a bank in payment of a check. Can it be returned? this was long ago answered in the affirmative. Said Judge Kent: "It would be matter of regret if the law obliged us to regard a payment in counterfeit, instead of genuine bank bills as a valid payment of a debt, merely because the creditor did not perceive and detect the false bills at the time of payment. The reasonable doctrine, and one which undoubtedly agrees with the common sense of mankind, is laid down by Paulus in the Digest, and has been incorporated into the French law. He says that if a creditor receive by mistake anything in payment, different from what was due, and upon the supposition that it was the thing actually due, as if he receive brass instead of gold, the debtor is not discharged, and the creditor upon offering to return that which he received, may demand that which is due by the contract."<sup>1</sup> The receiver, however, must return the counterfeit note within a reasonable time after discovering the forgery. "But what shall be considered a reasonable

<sup>1</sup> Markle v. Hatfield, 2 Johns. 455; Boyd v. Mexico Southern Bank, 67 Mo. 537.

time must necessarily depend on the situation of the parties and the facts and circumstances of each case."<sup>1</sup>

§ 304. **Genuine but worthless notes.** When the notes paid are genuine, but worthless, though this is not known either by the payee or receiver, can they be returned? On this point the Supreme Court of Michigan has declared that no settled rule exists. Unhappily, that court did nothing in the way of deciding what the rule ought to be.<sup>2</sup>

§ 305. **Must bank return an equivalent.** (a) *Rule in Illinois.* In Illinois if a bank receive a general deposit it must pay money of equal value.<sup>3</sup> This rule has been applied in North Carolina. A bank there in 1860 gave to a depositor a certificate stating that he had deposited a sum "in current notes of the different banks of the State," which was "payable in like current notes to the depositor, or to his order on return of the certificate." It was declared to be liable for the whole amount with interest from the date of the demand, in currency of the United States.<sup>4</sup> And when a deposit account is credited with "dollars," evidence of custom will not be admitted to prove that the liability can be discharged in something else.<sup>5</sup>

<sup>1</sup> Simms v. Clark, 11 Ill. 137; Boyd v. Mexico Southern Bank, 67 Mo. 537; Howe v. Huntington, 15 Me. 350; True v. Thomas, 16 Id. 36; Cocker v. Franklin Hemp & Flax Manuf. Co., 3 Sumner, 530; Ellis v. Thompson, 3 Mees. & Wels. 445; Burrill v. Watertown Bank, 51 Barb. 105; Union Nat. Bank v. Baldenwick, 45 Ill. 375.

<sup>2</sup> Atwood v. Cornwall, 28 Mich. p. 340.

<sup>3</sup> Marine Bank v. Birney, 28 Ill. 90.

<sup>4</sup> Fort v. Bank, Phil. (N. C.) 417. The cases of Hamilton v. Eller, 11 Ira. 276, and Lackey v. Miller, Phillips, 26, were declared to be distinguishable from the above case. "Eller owed Hamilton the sum of \$150, which Hamilton agreed to receive 'in good trade, to be valued etc.,' provided it was delivered on or before the first day of January, 1844. Eller failed to deliver the trade and was obliged to pay the \$150. Miller in 1865 bought a cow of Lackey worth \$20, in good money, and gave his note for '\$71 in current bank notes.' It was held that it did not create a debt of \$71 in money, or United States coin, but was a promise to pay 'seventy-one current bank money dollars,' and a distinction is taken between a promise to pay in money, and a promise to pay in currency which was even still more depreciated," Phelps v. Town, 14 Mich. 374.

<sup>5</sup> Marine Bank v. Birney, 28 Ill. 90; Marine Bank v. Chandler, 27 Id. 525.

(b) *National rule.* The United States Supreme Court has declared a different rule. "Where the deposit is general," said Judge Clifford,<sup>1</sup> "and there is no special agreement proved, the title of the money deposited, whatever it may be, passes to the bank, and the transaction is unaffected by the character of the money in which the deposit was made, and the bank becomes liable for the amount as a debt, which can only be discharged by such money as is by law a legal tender." This principle was applied by the United States Supreme Court in the following case: A deposit of bank-notes was made with the bank that issued them, which at that time were worth one half of their nominal value. The bank was required by its act of incorporation to redeem its notes in gold and silver. Subsequently, the depositor called for the payment of his deposit in gold, but the cashier offered to pay only notes equivalent to those deposited. In the end the bank was obliged to pay the amount in gold or silver demanded by the depositor. The court, after saying that the language of the certificate of deposit given by the bank was expressive of a general and not a special deposit, added, that the transaction "was equivalent to receiving and depositing the gold or silver; if the bank did not so understand it, nothing would have been easier than to refuse to take the money as a formal deposit; and the holder of the bills would then have been put to his action upon the bills themselves, in which case he would certainly have received the gold or silver to the amount upon the face of the bill."<sup>2</sup>

(c) *Distinction between the two.* The distinction between the two rules may appear sharper if they are brought closely together. One requires the payment of money equal in market value to that received—to render to the creditor an equivalent in money for that received; the other rule requires the payment of the same amount of money without regard to its market value. In other words, a general deposit of one

<sup>1</sup> Thompson v. Riggs, 5 Wall. p. 678.

<sup>2</sup> Bank of Kentucky v. Wister, 2 Peters, 318; Wallace v. State Bank, 2 Eng. (Ark.) 61.

hundred gold dollars could be satisfied by paying one hundred paper dollars, though the latter might not exchange perhaps for fifty gold ones.

(d) *National rule applied in Louisiana.* In Louisiana, likewise, a general deposit, though consisting of gold coin, was satisfied by paying the same number of dollars in lawful money whether they were coins, notes, or some other thing.<sup>1</sup> The court said that where the simple relation of creditor and debtor only existed they could not recognize any distinction between a debt which sprung from an irregular deposit of gold, and one which sprung from an irregular deposit of any other lawful money. "Nor can we see why such a debt contracted, for example, in 1860, should now be satisfied by a judgment in lawful money, and one contracted in 1864, should not be satisfied in the same way. This may seem a harsh doctrine in this case but such hardships are apt to come when any thing else than gold and silver is made a legal tender."

(e) *In Pennsylvania.* In Pennsylvania a certificate of deposit of "gold payable . . in like funds with interest" was legally discharged, after the enactment of the legal tender law, in treasury notes. If the court regarded the deposit as general, and not a special deposit of coins the decision follows the above rule, but we cannot learn from reading the case whether the court intended to discriminate between a general and special deposit.<sup>2</sup> In Georgia, it has been decided that a bank fulfilled its duty by offering to pay the checks of a depositor in such funds as he had there. Thus a person died having the accepted check of Jones for the balance due him on a certificate of deposit. The holder after such person's death declined to receive the funds in payment. They were Confederate notes. The bank could not be held for any other.<sup>3</sup>

<sup>1</sup> Gumbel v. Abrams, 20 La. Ann. 568.

<sup>2</sup> Shollenberger v. Brinton, 52 Pa. 1, 26.

<sup>3</sup> Lester v. Georgia Rail. & Bank. Co., 42 Ga. 244. The charter of the Bank of Tennessee provided "that the bills or notes of said corporation originally

(f) *Concerning legal tender notes* issued by the national government which creditors were compelled to receive in payment, the Supreme Court of Michigan remarked in 1873 that "if payment in what is supposed to be legal tender paper is to be regarded as contingent and not absolute, the receiver should be regarded as having elected to retain it unless he uses speedy and active diligence to determine its character, and to notify the giver that he may protect himself against prior parties. In *Camidge v. Allenby*<sup>1</sup> a party who kept broken bank bills seven days without action was held estopped." In the case under review the receiver kept the notes more than five weeks without making inquiry. He could not return them after holding them so long.<sup>2</sup>

**§ 306. If bank agrees to pay gold, or in a particular manner.**

(a) *Must do so.* If, however, a bank agrees to pay in bullion or coin, it must do so or be answerable for the injury done; and if it agrees to pay in depreciated paper, the tender of it will satisfy the law, and in default of payment the depositor or promisee can recover only its market, and not its nominal value.<sup>3</sup> This principle was frequently applied in Illinois before the civil war, because the banks of the State were of doubtful solvency and their notes circulated at less than their face value.

made payable, or which shall have become payable on demand, in gold or silver coin, shall be receivable at the treasury of the State and by all the collectors and other public officers, in all payments for taxes or other moneys due to the State." This constituted a contract by the State to receive them from all persons for payment due to the State. The guaranty was not a personal one but attached to the notes when issued as much so as if written on the back of them. And it remained so long as the notes circulated, notwithstanding subsequent legislation against receiving notes that did not pass current as par, *Furman v. Nichol*, 8 Wall. 44. A certificate of deposit payable in "currency" is *prima facie* payable in current money or paper of equivalent value, and a witness without referring to any local custom or usage cannot testify that such a certificate is payable in depreciated funds, *Phelps v. Town*, 14 Mich. 374; see *Phenix Ins. Co. v. Allen*, 11 Id. 501.

<sup>1</sup> 6 Barn. & Cr. 373.

<sup>2</sup> *Atwood v. Cornwall*, 28 Mich. 336.

<sup>3</sup> *Robinson v. Noble*, 8 Peters, 181; *McCormick v. Trotter*, 10 Serg. & Raw. 94.

(b) *Kupfer v. Bank*.<sup>1</sup> In May, 1861, K. deposited with an Illinois bank \$1700 in American gold which was to be drawn in gold. At that time, when currency was deposited, that only could be drawn. K. drew \$400 in gold. The difference then in value between gold and currency was forty per cent. He drew currency on other checks and the bank claimed that K. appropriated the gold to pay them. Judge Breese, speaking for the court, said: "This deposit of gold coin was a special contract, to the effect that the bank would return the coin, or, on failing to do so, the depositor should be entitled to the value of the coin. The depositor was entitled, if he was paid in currency at a discount, to have the amount of that discount allowed to him, or, in other words, he was entitled to receive of the bank the premium at which gold was sold over currency, and this for the whole amount deposited unless he agreed to receive currency as coin. The bank had no right to make the depositor's check for currency a charge against this deposit of gold. What the gold was worth over and above currency at the time the depositor drew it out should be allowed. The several Acts of Congress making treasury notes a legal tender in the payment of private debts were not then enacted; consequently, the depositor was entitled to recover the value of the gold coin."

(c) *Chicago Marine & Fire Ins. Co. v. Carpenter*.<sup>2</sup> In April, 1861, an Illinois bank, unwilling to receive more deposits in notes of other banks of that State, agreed with a depositor to receive and pay the same during the war. Afterwards he deposited there to a large amount. He also drew checks against his deposits until the 18th of May when all the notes of the Illinois banks, with a few exceptions, became so depreciated that they ceased to circulate as money. At that time the bank owed the depositor about \$100 for deposits made after the agreement. In an action against the bank the depositor recovered the specie value of the deposits due to

<sup>1</sup> 34 Ill. 328, p. 355.

<sup>2</sup> 28 Id. 360.

him which had been made prior to the agreement and the current value of those made afterwards.

(d) *Case of mutual accounts.* Two bankers in the usual course of business, had mutual accounts for remittances and collections, the depositor having the right to withdraw his funds at pleasure and the receiver having the same right to return them. In the absence of a special agreement on the subject it was held that each holder of deposits would be compelled to pay or return them in current or par funds.<sup>1</sup> But when one of them, who had a balance in his favor, notified the other that any remittances which he desired to make should be in the notes of specified banks, the debtor banker had the right to remit the entire amount in the notes of those banks whether they were depreciated or not.

§ 307. **Payment of deposit in commodity.** But if a bank receive, not money but a commodity, Confederate notes for example, and the sender of a note to be collected supposes that these will be received in payment, the bank is required to pay only the value of the commodity when demanded. Should the bank, in the interval between receiving the notes and the demand therefor, employ them in its business, its liability would not be changed.<sup>2</sup>

(a) *Cannot do this by custom.* Furthermore, while banks can agree with their depositors to discharge their indebtedness in any commodity in lieu of money by special agreement, they cannot do this in any locality by virtue of a custom prevailing there. When this question was raised in an Illinois case, Judge Walker said: "The special custom of banks in a particular locality [cannot] change the laws of the land, regulating the value of the currency and fixing a standard value of the current coins. That parties may contract to receive any commodity in lieu of money, in payment of indebtedness, is undeniably true. This can only be done by special agreement and not by usage. No custom can compel a creditor in the

<sup>1</sup> Cushman v. Carver & Co., 51 Ill. 509.

<sup>2</sup> Planters' Bank v. Union Bank, 16 Wall. 483.

absence of a special agreement, to receive anything but the constitutional currency of the country. The fact that the business men of a particular place have been in the habit of receiving depreciated paper money in payment of their demands, by no means proves that all creditors in that locality have agreed to receive the same, much less a person residing hundreds of miles distant. To have such an effect a special agreement must be proved."<sup>1</sup>

§ 308. **Depreciated and depreciating deposits.** If a bank receive a deposit in current funds without direction to hold them specifically, it must account for the amount without diminution or discount, although they may have depreciated in value since receiving them.<sup>2</sup> But if bank notes are deposited as depreciated paper, the depositor has no right to draw for par funds, or expect that payment of a check thus drawn will be paid.<sup>3</sup>

§ 309. **Check must be paid in money.** A bank is not required to pay the check of a depositor in anything but money. The giving of exchange instead of money can only be by agreement. So, when a depositor drew a check on his bank for Chicago exchange which he wished to send to his creditors at their request, they could not, on the failure of the depositor to send it, maintain an action against the bank on the original check.<sup>4</sup>

§ 310. **Money in which bank must pay collections.** When a bank makes collections and mingles them with its general fund, the money collected becomes a deposit and is governed by the same rules as deposits in general. And if such funds were depreciated at the time of receiving them, or become so before they are demanded, the bank must suffer the loss arising from their depreciation.<sup>5</sup> Moreover, when a bank is

<sup>1</sup> *Marine Bank v. Chandler*, 27 Ill. 525, p. 548.

<sup>2</sup> *Id.* 525; *Marine Bank v. Rushmore*, 28 Id. 463; *Willetts v. Paine*, 43 Id. 432.

<sup>3</sup> *Id.*; *Lawrence v. Schmidt*, 35 Id. 440; *Galena Ins. Co. v. Kupfer*, 28 Id. 332.

<sup>4</sup> *Hogue v. Edwards*, 9 Brad. 148.

<sup>5</sup> *Marine Bank v. Rushmore*, 28 Ill. 463.



thus acting as collection agent it has no right, unless special authority be given, to receive only the legal currency of the country, or bills which pass as money at their par value by the common consent of the community.<sup>1</sup> The doctrine that bank bills are a good tender, unless objected to at the time on the ground that they are not money, only applies to current bills, which are redeemed at the counter of the bank on presentation, and pass at par value in business transactions at the place where offered. Notes not thus current at their par value, nor redeemable on presentation, are not a good tender to principal or agent, whether they are objected to at the time or not.<sup>2</sup>

§ 311. **Purpose of check for "current funds."** If a check is drawn for "current funds," the holder can demand coin or its equivalent. "The term funds as employed in commercial transactions usually signifies money." A check payable in "current funds" means "current money; par funds, or money circulating without any discount." The holder of such a check has the right to demand funds equal in value to the current coin of the country.<sup>3</sup> But if a check be given which, presented within a reasonable time, would be paid in current funds, the maker cannot be held for its non-payment in them.<sup>4</sup>

§ 312. **Payment by special law.** By a Missouri law enacted in 1857, all checks drawn on bankers and made payable "in currency" were thereby made "payable" in silver and gold, or the notes of specie-paying banks of that State. Checks, therefore, which were expressed to be payable in currency, could not be paid in the notes of depreciated banks, but only those that paid specie or specie itself.<sup>5</sup>

§ 313. **Check drawn for dollars and not bank bills.** In *Lawrence v. Schmidt*,<sup>6</sup> "the check was drawn for money; for dol-

<sup>1</sup> *Ward v. Smith*, 7 Wall. 447; *Levi v. National Bank*, 5 Dill. 104.

<sup>2</sup> *Clifford, J., Ward v. Smith*, 7 Wall. p. 451.

<sup>3</sup> *Galena Ins. Co. v. Kupfer*, 28 Ill. 332.

<sup>4</sup> *Willets v. Paine*, 43 Id. 432.

<sup>5</sup> *Morrison v. McCartney*, 30 Mo. 183.

<sup>6</sup> 35 Ill. 440.

lars and not for bank bills, or other kinds of circulating medium. The check was presented on the day it was drawn and payment in money was refused, but bank bills at 30 per cent. to 40 per cent. discount were offered and refused. It also appeared that the drawer did not have cash-money in the hands of the drawee, and hence notice of non-payment was unnecessary. He had no right to believe it would be paid in money, or that the holder would receive depreciated bills. Upon its non-payment the drawer's liability was fixed without any steps."

§ 314. **Civil war cases.** (a) *In what could drafts and deposits be paid.* We shall conclude the chapter by reviewing a few cases which arose from the peculiar events of the civil war. When Confederate treasury notes were bankable funds in New Orleans and Nashville, a deposit in a bank at New Orleans in checks and drafts drawn by a Nashville bank and by citizens of the State were subsequently considered by the courts of Louisiana as having been made in these notes, nor could a depositor recover the amount in money.<sup>1</sup> Nor could a check or draft drawn by one person on another within the Confederacy and payable in its notes be collected in money.<sup>2</sup> By buying such a check or draft the purchaser was giving credit to an illegal currency, he was "*particeps criminis*" and entitled to no relief.<sup>3</sup> Nor could a deposit of Confederate money give the depositor the right to exact legal-tender notes in payment; the transaction was illegal.<sup>4</sup> But if the deposit had been made in lawful money this could have been recovered by the depositor, nor would the paying over of all its Confederate notes to officers of the national government by their command have furnished an excuse for not paying him, for the seizure of the illegal notes which the bank had no right to receive could not exonerate it from paying a depositor. If, however, the deposit had been made in Confederate notes it could not have been recovered.<sup>5</sup> But to excuse a bank on this ground from

<sup>1</sup> Foster v. Bank, 21 La. Ann. 338.

<sup>2</sup> Id.

<sup>3</sup> Id.

<sup>4</sup> Schmidt v. Barker, 17 Id. 261.

<sup>5</sup> Nelligan v. Citizens' Bank, 21 Id. 332.

paying a depositor or the maker of a note the evidence that Confederate notes were received must be conclusive; nothing could be left to conjecture or inference.<sup>1</sup>

(b) *What excused payment.* In another instance when the money in the bank was seized by the commanding general of the Union army, this was declared to be a sufficient excuse for not paying a depositor whose deposit was a portion of the amount thus taken.<sup>2</sup>

(c) *Usage and mode of paying after war.* A bank which during the civil war adopted a new usage and custom with its depositors with regard to Confederate currency could not introduce proof of it to affect one who had been a regular customer before the war and continued to be one, unless he had notice of the same.<sup>3</sup> This was decided in a case against the Bank of Cape Fear. Other novel questions arose and were decided in that case. In October, 1861, a balance was due a depositor in par funds. Subsequently his dealings with the bank were in Confederate notes which soon began to depreciate, as both parties well knew. After the war the State established a scale for ascertaining the value of deposits made in these notes during the war and by which such transactions were to be settled. It was held in a case involving the application of the scale that the depositor's account must be divided, that his deposit before October 1, 1861, should be estimated in par funds. To give full effect to the payment of the bank and allow the depositor the proper value of his deposit, each payment ought to be deducted from the next preceding deposit, and when the deposits were in excess of payment then a balance ought to be struck and the value of the excess ascertained by the scale and form a part of the general deposit. In this way the nominal amount of the payments would be deducted from the nominal amount of the preceding deposits, and this process could be continued until all the payments

<sup>1</sup> *Greeves v. Louisiana State Bank*, 22 La. Ann. 228; *Weaver v. Anfoux*, 20 Id. 1.

<sup>2</sup> *Mandeville v. Bank*, 19 Id. 392.

<sup>3</sup> *Boyd v. Bank of Cape Fear*, 65 N. C. 13.

were allowed as credits. The value of the excess of the various deposits at the time they were made with the premium added would constitute the true balance of the Confederate currency transactions and this sum added to the amount of the par funds due October 1, 1861, would constitute the amount due the depositor at the time of the demand in March, 1864. "When the final balance was struck in March, 1864, the bank was not authorized by law to pay the balance due in notes of like character and amount as those received; but its implied contract was to pay funds equivalent in value to the funds deposited."<sup>1</sup>

<sup>1</sup> *Marine Bank v. Chandler*, 27 Ill. 525; *Marine Bank v. Fulton Bank*, 2 Wall, 252. In *Tayloe v. Dugger*, 66 Ala. p. 448, Stone, J., remarked that the question how far Confederate treasury notes would discharge a debt when accepted in payment had been a very vexed question ever since the downfall of the Confederacy. "They had a purchasing power, and a conventional value up to the surrender at Appomattox; and they were, for four years, almost the sole circulating medium accessible to many millions of people. They were issued in aid of the struggle the Southern States were making against the power of the Federal government to exercise dominion within their borders; and when that armed assistance to Federal authority was overcome, and the Southern army vanquished, this established the fact that the issue of such Confederate treasury notes was illegal, *ab initio*, because its purpose was to aid an armed resistance to authority, ascertained and proved to be rightful. . . Their issue was, then, illegal, because it was ascertained they were aimed against the integrity of the Union. Viewed from the standpoint the result of the civil war makes it our duty to take, all the Confederate securities were issued against law, and they imposed no obligation on any one for their redemption." *Thorington v. Smith*, 8 Wall. 1, and many other cases relating to the subject, are reviewed in the above case.

## CHAPTER XII.

## WHEN CAN A DEPOSITOR SUE A BANK.

§ 315. **Must make demand before bringing action.** When a bank receives money on deposit in the ordinary way the depositor cannot maintain an action therefor, without making a previous demand either by check or other means. In a case involving the application of this principle Judge Bronson said: "Judging from the ordinary course of this business [between bank and depositor] I think the understanding between the parties is that the money shall remain with the banker until the customer, by his check, or in some other way, calls for its repayment; and if such be the nature of the contract, the banker is not in default and no action will lie until payment has been demanded. No one could desire to receive money in deposit for an indefinite period with a right in the depositor to sue the next moment and without any prior intimation that he wished to recall the loan."<sup>1</sup>

§ 316. **Same rule for certified checks.** The same rule applies to a certified check. "The certification simply binds the drawee bank to have and hold sufficient funds to pay the

<sup>1</sup> *Downes v. Phenix Bank*, 6 Hill. 297, p. 299. Nor will the striking of a balance on a depositor's bank-book by a bank clerk change the rule. In the above-mentioned case in which this was done Judge Bronson said it "was but the ordinary transaction of writing up the customer's book; or, in other words, setting the debits, or sums which had been paid upon his checks against the credits which were given in the book at the time the deposits were made. It only rendered the account complete up to the time when the balance was struck. It furnished no evidence of a change of the contract upon which the money was received in deposit." No action can be maintained to recover a deposit before demanding payment, *National Bank v. Washington Co. Nat. Bank*, 5 Hun, 605; *Howell v. Adams*, 68 N. Y. 314; *Payne v. Gardiner*, 29 Id. 146; *Watson v. Phenix Bank*, 8 Met. p. 221; *Brown v. Lusk*, 4 Yerg. 210; *Levy v. Peters*, 9 Serg. & Raw. 125; *Adams v. Orange County Bank*, 17 Wend. 514.

check to one lawfully demanding payment. In other respects it still remains a depository liable to pay only upon demand. It would be a very inconvenient rule, subversive, it is believed, of the usage and contrary to the understanding of bankers to hold that all certified checks were due and could be sued upon without demand."<sup>1</sup>

§ 317. **Same rule applicable to certificate of deposit.** (a) *Applied everywhere.* The same rule applies to a certificate of deposit. Said Judge Andrews, in *Howell v. Adams*:<sup>2</sup> "We think it is in accordance with the general understanding of the commercial community that a bank is not liable to depositors except after demand of payment. The fact that a certificate is given on a deposit being made payable on the return of the certificate instead of leaving the deposit subject generally to check or draft does not change the reason of the rule that the banker must first be called upon for payment before an action can be maintained."<sup>3</sup>

(b) It may be remarked in passing that in the States which regard a certificate of deposit as a promissory note, having all the characteristics of that instrument—one of which is that the maker can be sued without first demanding payment of him—the maker of a certificate of deposit cannot be sued until payment has been demanded of him.<sup>4</sup>

§ 318. **Must make demand for special sum when recoverable.** And whenever a depositor can recover an additional sum by a special law on the failure of a bank to pay him his deposit, he must make a demand for the sum to sustain an action for its recovery.<sup>5</sup>

§ 319. **Demand of entire deposit.** A demand for the whole of a deposit is not requisite to sustain a suit against the bank for a part of the same. "The implied contract between a

<sup>1</sup> *Bank of British North America v. Merchants' Nat. Bank*, 91 N. Y. p. 110; Aff. 48 N. Y. Sup. Ct. 1.

<sup>2</sup> 68 N. Y. p. 321.

<sup>3</sup> *Bellows Falls Bank v. Rutland County Bank*, 40 Vt. 377; *Munger v. Albany City Nat. Bank*, 85 N. Y. 580.

<sup>4</sup> *Pardee v. Fish*, 60 Id. 265; *Brown v. McElroy*, 52 Ind. 404.

<sup>5</sup> *Bank of Missouri v. Benoist*, 10 Mo. 519.

bank and its depositor," said Judge Miller,<sup>1</sup> "is that it will pay the deposits when and in such sums as are demanded. Whenever a demand is made by presentation of a genuine check in the hands of a person entitled to receive its amount, for a portion of the amount on deposit and payment is refused, a cause of action immediately arises. For the balance no suit can be brought until demand is made. In other words, the depositor has the election to make the whole claim payable at one time by demanding the whole, or in instalments by demanding portions."

§ 320. **Demand of savings bank deposit.** If money be deposited in a savings bank which is payable at fixed times, demand must be made, after which it can be recovered when the proper time has arrived, and a depreciation of its funds is no defence. But it was questioned in the case establishing the foregoing principle whether a court of equity would not apportion the loss among depositors in due proportion between them if application were made to have this done.<sup>2</sup>

§ 321. **Post-dated check.** If a check be made payable fifteen days after date it is necessary in a suit against the payee to prove that payment was demanded at the bank when it became due.<sup>3</sup> If a declaration should aver that a demand was made after a check became due according to the custom of merchants this would be a defective averment and a recovery could not be had in such a case.<sup>4</sup>

§ 322. **Demand when bank has failed.** (a) *Remarks of Hubbard, J.* When a bank suspends payment a demand is not necessary before bringing a suit to recover the deposit.<sup>5</sup> Said Judge Hubbard in *Watson v. Phoenix Bank*:<sup>6</sup> "Where the bank has suspended payment and closed its doors and refuses to admit its creditors, there a demand would be unavailing, and the bank, by its acts, has waived the necessity of a

<sup>1</sup> *Viets v. Union National Bank*, 101 N. Y. p. 573.

<sup>2</sup> *Makin v. Institution*, 19 Me. 128. See § 188.

<sup>3</sup> *Glenn v. Noble*, 1 Blackf. 104.

<sup>4</sup> *Id.*

<sup>5</sup> *Farmers & Mechanics' Bank v. Planters' Bank*, 10 Gill & Johns. 422.

<sup>6</sup> 8 Met. p. 222.

demand.”<sup>1</sup> In the foregoing case Watson went to the bank for the purpose of obtaining his deposit, but was purposely excluded by the person appointed by the president of the bank to prevent persons from entering it in consequence of the suspension of payments. This act was deemed equivalent to a demand by Watson.

(b) *Allowance of claim proof of demand.* Can he afterward bring a suit against the bank for the amount allowed? In Massachusetts the court said in a suit involving this question, if the depositor has begun a suit and made an attachment which is not dissolved by the failure of the bank “he is bound to make his election; and is not entitled to the benefit of both funds to the exclusion of other creditors.” On the other hand, “he is not concluded as to this election by the mere proof of his debt before the receivers, they not having required of him to give up to them the evidence of his demand, nor agreed to pay him a dividend.”<sup>2</sup>

(c) *Suit against bank for amount allowed.* When the bank has failed, the allowance of a depositor’s claim by the receivers is sufficient proof of a demand to maintain a suit against it for his deposit.<sup>3</sup>

§ 323. **Demand not necessary after rendering account.** A demand is not necessary by a depositor after a bank has rendered an account and claims the deposit as its own, for the law compels no man to do a vain or nugatory act.<sup>4</sup>

§ 324. **Demand when deposit is illegal.** If the contract of deposit be illegal and not enforceable, the money can be recovered back in a different form of action.<sup>5</sup> And in such a case the money can be recovered without first demanding payment of the depository.<sup>6</sup>

<sup>1</sup> Cooper v. Mowry, 16 Mass. 5.

<sup>2</sup> Watson v. Phoenix Bank, 8 Met. 217, p. 222; Morse v. City of Lowell, 7 Id. 152.

<sup>3</sup> Glenn v. Noble, 1 Blackf. 104.      <sup>4</sup> Bank of Missouri v. Benoist, 10 Mo. 519.

<sup>5</sup> White v. Franklin Bank, 22 Pick. 181; Robinson v. Bland, 2 Burr. 1077; Utica Ins. Co. v. Scott, 19 Johns. 1; Utica Ins. Co. v. Cadwell, 3 Wend. 296; Utica Ins. Co. v. Bloodgood, 4 Id. 652.

<sup>6</sup> Id.



§ 325. **Bank cannot be sued on verbal acceptance.** As a check is a bill of exchange within the meaning of the Statute of Frauds—which requires a promise to be in writing—the drawee cannot be held on a verbal promise of acceptance.<sup>1</sup>

§ 326. **Third party can sue bank on its promise to pay depositor's money.** If a bank receive money from a depositor and promise to pay the same to a third party, the latter may maintain an action for the amount in the event of non-payment. Nor can a bank defend by showing that the money was deposited in the customer's name and with his consent, or that he at the time promised to make a further deposit to cover his own indebtedness to the bank and failed to do so.<sup>2</sup>

§ 327. **Check sent by bank, but not received.** A. in Boston sent to a bank in Maine a check for \$200 drawn on the bank by one who had funds there, and in his letter said: "Please send me a check on some Boston bank for the inclosed check." The bank sent in a letter \$4.28 in currency and a check on a Boston bank for \$195.72, but the letter was never received. Failing to get a duplicate check from C., who subsequently failed, A. sued the bank and recovered.<sup>3</sup>

§ 328. **Fraud in former transaction no defence by bank.** Whenever a bank credits a depositor with the proceeds of a note discounted by fraudulent representations and pays his checks drawn against such deposits, it cannot set up the fraud as a defence to an action to recover subsequent deposits.<sup>4</sup>

§ 329. **Recovery of interest.** "As a general rule deposits of money in bank subject to the checks of the depositor draw no interest."<sup>5</sup> But if there should be unreasonable or vexatious delay in paying them interest might be recovered.<sup>6</sup> Nor is the defending in good faith of a suit for the recovery of a deposit a vexatious delay.<sup>7</sup>

<sup>1</sup> *Risley v. Phenix Bank*, 83 N. Y. 318; *Aff.* 11 Hun, 484. See § 229, e, f.

<sup>2</sup> *Utley v. Tolfree*, 77 Mo. 307.

<sup>3</sup> *Ames v. York Nat. Bank*, 103 Mass. 326.

<sup>4</sup> *Andrews v. Artisans' Bank*, 26 N. Y. 298.

<sup>5</sup> *First Nat. Bank v. Coleman*, 11 Brad. p. 511. See § 45.

<sup>6</sup> *Id.*; *Jassoy v. Horn*, 64 Ill. 379. <sup>7</sup> *Aldrich v. Dunham*, 16 Id. 403.

§ 330. **Loan to cashier is loan to bank.** When loans have been made to banks, they have sometimes resisted recovery on the ground that they were personal to the cashier and not to the bank itself. This ground has been taken when the checks or notes for the loans have been made payable to the bank with the addition of the word "cashier." But the clear rule of law is, that if the word cashier be added to the name of the payee bank in commercial paper the bank is nevertheless the payee and responsible therefor. Nor is his indorsement necessary to give the bank title.<sup>1</sup>

§ 331. **When surety is discharged.** When a person becomes a grantor on a check running for a month, on the representation of the maker that it shall be used as collateral security for a note that is to be discounted, the discounteer cannot permit the use of the avails of the note when paid in any different manner than that intended by the parties to the check without discharging the guarantor. Said Ames, C. J.,<sup>2</sup> "in such a case, the creditor is regarded as a trustee of the security deposited with him, for the benefit of all parties known to him to be interested in it, and is bound to administer the trust created by the deposit, unless discharged by the surety, in his relief, as well as in accordance with his own interests, and those of the principal. It follows, that any application of the security by the creditor to other purposes than those marked out by the terms of the deposit or any decrease of its value by means of his negligence or mistake, discharges the surety from liability to him in that character, to the extent of the misapplication or decrease of value thus occasioned."<sup>3</sup> . . The defendant is not only a surety, but be-

<sup>1</sup> First Nat. Bank v. Hall, 44 N. Y. 395; Bank of Genesee v. Patchin Bank, 19 Id. 312; Bank of New York v. Muskingum Branch of Bank of Ohio, 29 Id. 619; Fish v. Marine Bank, 17 Week. Dig. 287.

<sup>2</sup> Hidden v. Bishop, 5 R. I. 29, after reviewing Lake v. Brutton, 8 De Gex, M. & G. 440.

Mayhew v. Crickett, 2 Swanst. 193; Samuel v. Howarth, 3 Mer. 272; Law v. The East India Co., 4 Ves., Jr., 824; 2 Am. Lead. Cas., Hare & Wallace's Notes, 343 to 369 inclusive, for American cases.

came such in the matter of this discount, upon the representation of his principal that the check was to be merely collateral to the note of P. Allen & Sons, which was for an amount exceeding it, and that he would thus be protected from any loss in consequence of his suretyship. The plaintiff was apprised of the character in which the defendant engaged himself to him, by the very form of his engagement as well as by the fact that the maker of the check procured and received the benefit of the discount, and under the circumstances might reasonably have presumed, what turns out to be true, that the defendant indorsed the check upon faith of being protected in some mode by the note of P. Allen & Sons. The application of the proceeds of that note by direction of the principal, and without the assent of the defendant, to other paper discounted by the plaintiff, and in relief of other sureties, one of them his near connection, was far within the rule so well and wisely established for the protection of sureties, a clear breach of the trust created by the original deposit for the benefit of the defendant. As the note of P. Allen & Sons has been paid, and in amount exceeds the amount of this indorsement, the equities between these parties are perfectly administered by holding, as we do, the defendant discharged as guarantor."

## CHAPTER XIII.

WHEN CAN THE HOLDER OF A CHECK SUE THE DRAWER AND  
INDORSER.

§ 332. **Must demand payment of the drawee.** Before the holder of a check can maintain an action thereon against the drawer, he must demand payment of the same of the drawee.<sup>1</sup> The demand can be made at any time before bringing the suit.<sup>2</sup>

§ 333. **Must show notice of non-payment or excuse.** He must also show that notice of non-payment was given, or a legal excuse for not giving it.<sup>3</sup> And if the check be post-dated, the holder must likewise give notice to the drawer that it was dishonored in order to recover.<sup>4</sup>

(a) *Failure of drawee.* Some things, however, will excuse demand; one of which is the failure of the drawee.<sup>5</sup> “In *Bickerdike v. Bollman*,”<sup>6</sup> says Chief Justice Lewis, “it was held that when the drawer had no effects in the hands of the drawee at the time the bill was drawn, notice was not necessary. It is sometimes said that this exception to the

<sup>1</sup> *Harker v. Anderson*, 21 Wend. 372; *Judd v. Smith*, 3 Hun, 190; *Murray v. Judah*, 6 Cow. 484; *Sherman v. Comstock*, 2 McLean, 19; *Case v. Morris*, 31 Pa. 100; *Purcell v. Allemon*, 22 Gratt. 739; *Little v. Phenix Bank*, 2 Hill. 425. In an action against the drawer, the complainant must aver presentment of the check at the bank, and that notice of its dishonor was given to the drawer, or some fact excusing presentment and notice, *Dolph v. Rice*, 18 Wis. 397.

<sup>2</sup> *Gough v. Staats*, 13 Wend. 549.

<sup>3</sup> *Case v. Morris*, 31 Pa. 100; *Pollard v. Bowen*, 57 Ind. 232; *Griffin v. Kemp*, 46 Id. 172.

<sup>4</sup> *Bradley v. Delaplaine*, 5 Harr. 305.

<sup>5</sup> *Little v. Phenix Bank*, 2 Hill. p. 429; *Gough v. Staats*, 13 Wend. 549; *Jackson Ins. Co. v. Sturges*, 12 Heisk. 339; *Planters' Bank v. Merritt*, 7 Id. 177; *Planters' Bank v. Keese*, Id. 200.

<sup>6</sup> *Case v. Morris*, 31 Pa. 100, p. 104.

general rule is placed on the ground that it was a fraud to draw the bill when the drawer knew that it would not be paid. At other times, it is said that the drawer's knowledge that it would be dishonored is tantamount to demand and notice. But, whatever may be the grounds for that decision, it is very certain that it introduced an exception to a plain and intelligible rule of commercial law which many eminent and experienced judges have since regretted. It is adhered to on the principle of *stare decisis*, but it is not to be extended a single step. . . . The principle to be extracted from the cases is that wherever the presentment for payment and notice of dishonor could be of no benefit to the drawer it may be dispensed with." Moreover, the principle is as applicable to checks as to bills of exchange.<sup>1</sup>

(b) *Lack of funds.* Another excuse is the lack of funds with the drawee. The drawing of a check under such circumstances, unexplained; is a fraud which deprives the maker of every right to require presentation and demand of payment.<sup>2</sup>

(c) *Withdrawal of funds.* When the drawer of a check informs the payee that he has withdrawn his deposit from the drawee bank, a demand is not necessary in order to sustain an action against the drawer. In a case of this kind in which a drawer withdrew his deposit in order that his own check might be dishonored, the court remarked, in an action brought against him to recover the amount, "How then can he complain of a want of demand or notice, when he himself purposely fixed the refusal; and of course by his own act had notice of the consequent dishonor of his bill, even in anticipation of the demand and refusal of payment. It would, too, be permitting a man to take advantage of his own unjust device."<sup>3</sup>

(d) *Part payment after maturity.* When a drawer pays

<sup>1</sup> Case v. Morris, 31 Pa. 100, p. 104.

<sup>2</sup> Franklin v. Vanderpool, 1 Hall. 78; Bond v. Farnham, 5 Mass. 170; Fletcher v. Pierson, 69 Ind. 281.

<sup>3</sup> Sutcliffe v. McDowell, 2 Nott & McCord, 251.

part of a check after it becomes due it is not necessary in an action for the balance to prove a demand on the bank.<sup>1</sup>

(e) *Or before.* Nor would a demand on the bank be necessary if the check had been paid in part before it became due. But the holder of a check cannot by voluntarily giving credit for a part payment evade the necessity of proving a demand on the drawee if the drawer disclaims such credit and insists on the want of demand. If, on the other hand, he acquiesces in such credit and insists that the whole has been paid and relies on the length of time and other circumstances to discharge him entirely, he admits the fact of part payment.<sup>2</sup>

§ 334. **Can sue in his own name.** "It is well settled that any holder of a check who can trace a clear legal title to it may maintain an action upon it in his own name whether he possesses the beneficial interest in its contents or not. The possession of such holder is *prima facie* sufficient evidence of his right to sue."<sup>3</sup>

§ 335. **Demand necessary before resorting to original cause of action.** When a creditor receives from his debtor a check he can return the same and sue on the original cause of action without first demanding payment. And if the check is returned immediately after the drawee has signified its unwillingness to certify it, this is a notice to the drawer that the holder has declined to receive it for his debt.<sup>4</sup>

§ 336. **Demand in action against indorser.** In an action against the indorser a demand of payment from the drawee must be shown even though he had no funds in his possession

<sup>1</sup> Levy v. Peters, 9 Serg. & Raw. 125.

<sup>2</sup> Id.

<sup>3</sup> Judge Lewis, Harpending v. Daniel, 80 Ky. p. 451; Murray v. Judah, 6 Cow. 484; Townsend v. Billinge, 1 Hilton, 353. The holder of a check payable to bearer may sue in his own name though he holds it as agent for another, Mauran v. Lamb, 7 Cow. 174. A check imports consideration, and the payee may sue in his own name though another be interested in the proceeds, Fish v. Jacobsohn, 1 Keyes, 539; S. C., 2 Abb. App. Dec. 132; Aff. 5 Bosw. 514. The drawer of an accommodation check is as much responsible as he would be if it were issued for a consideration, Harbeck v. Craft, 4 Duer, 122.

<sup>4</sup> Bradford v. Fox, 39 N. Y. 289.

belonging to the drawer or any reasonable expectation of having any.<sup>1</sup>

§ 337. **Post-dated checks.** When two persons exchange checks which are post-dated, each agreeing to meet his check at maturity, and one of them fails to do so, this is no defence to the other check when owned by a *bona fide* holder.<sup>2</sup>

(a) *Stedman v. Carstairs.*<sup>3</sup> On one occasion A. and B. exchanged checks with each other. On depositing A.'s check B. learned that there was no money to pay it, and he asked A. to make his check good. At that time A. was in fair credit, though in truth insolvent. Having persuaded C. to exchange checks, A. gave C.'s check to B. and received back his own. B. then drew the money on C.'s check, while C., on depositing A.'s check, received not money but unwelcome light concerning A.'s condition. He had no money in the bank. C. then sued B. to recover the amount drawn on his check, but it was decided that as A. was in "fair financial standing," he gave a valuable consideration for C.'s check and therefore the latter could not recover on the ground of no consideration.

(b) *Accommodation post-dated check.* In a suit against the maker of an accommodation post-dated check by an indorser for value the defence that the payee was to furnish the money to pay the check is no defence.<sup>4</sup>

(c) *Signed by agent.* When an agent drew a post-dated check or negotiable check on a bank and signed it with his own name, adding thereto the word "agent," but without indicating thereon the name of his principal and the party to whom the check was delivered, negotiated it to a third person before the day of its date, it was held that the principal was not bound by the check and the holder could not maintain an action against him.<sup>5</sup>

<sup>1</sup> *Mohawk Bank v. Broderick*, 10 Wend. 304.

<sup>2</sup> *Frazier v. Trow's Printing and Bookbinding Co.*, 90 N. Y. 678; *Aff.* 24 Hun, 281.

<sup>3</sup> 97 Pa. 234.

<sup>4</sup> *Mayer v. Mode*, 14 Hun, 155.

<sup>5</sup> *Anderton v. Shoup*, 17 Ohio St. 125.

§ 338. **Check deposited on collateral agreement.** A person with whom a check is deposited on a collateral agreement can maintain no action against the drawer if the collateral agreement has not been performed.<sup>1</sup>

§ 339. **Forged indorsement.** The drawer of a check is not liable to any one claiming through a forged indorsement.<sup>2</sup> And if it be obtained from him by fraud and payable to an existing firm he is not liable to an innocent indorsee holding the check under a forged indorsement of the payee's name.<sup>3</sup>

§ 340. **Check for stolen goods.** A person went to A.'s hotel and registered his name as B. He then took goods to C., of which he claimed to be the owner, for sale and which were purchased in good faith. C. paid by giving his check payable to B.'s order and which he subsequently gave to the hotel, receiving in return the balance of the amount in money. C., learning that the goods had been stolen, directed the bank not to pay the check, but A. recovered thereon.<sup>4</sup>

<sup>1</sup> *Claffin v. Fisher*, 8 Alb. L. J. 285; Aff. 55 N. Y. 657.

<sup>2</sup> *Palm v. Watt*, 7 Hun, 317.

<sup>3</sup> *Rowe v. Putnam*, 131 Mass. 281; *Dana v. Underwood*, 19 Pick. 99; *Boardman v. Gore*, 15 Mass. 331, 338; *Peaslee v. Robbins*, 3 Met. 164; *Carrier v. Sears*, 4 Allen, 336; *Foster v. Shattuck*, 2 N. H. 446. *Rogers v. Ware*, 2 Neb. 29, contains an elaborate review of the cases.

<sup>4</sup> *Robertson v. Coleman*, 141 Mass. 231.



## CHAPTER XIV.

## WHEN CAN THE CHECK HOLDER SUE THE DRAWEE.

§ 341. **Check holder cannot sue drawee.** (a) *Opinion of Davis, J.* As the ordinary relation existing between bank and depositor is that of debtor and creditor, no action can be maintained by the holder of a check against a depository-bank to recover the amount unless it has signified its willingness to pay the same. There was a long controversy in the courts before they reached this conclusion. In one of the earlier cases,<sup>1</sup> Judge Gardiner said: "The drawee owes no duty to the holder until the check is presented and accepted." In 1869 the United States Supreme Court rendered an opinion which is regarded as closing the controversy.<sup>2</sup> Judge Davis said that "there should be no mistake about the status which the holder of a check sustains towards the bank on which it is drawn. It is very clear that he can sue the drawer if payment is refused, but can he also, in such a state of case, sue the bank? It is conceded that the depositor can bring [an action] for the breach of the contract to honor his checks, and if the holder has a similar right, then the anomaly is presented of a right of action upon one promise for the same thing existing in two distinct persons at the same time. On principle, there can be no foundation for an action on the part of the holder, unless there is a privity of contract between him and the bank. How can there be such a privity when the bank owes no duty and is under no obligation to the holder? The holder takes the check on the credit of the drawer in the belief that he has funds to meet it, but in no sense can the bank be said to be connected with the trans-

<sup>1</sup> *Chapman v. White*, 6 N. Y. 412.

<sup>2</sup> *Bank of the Republic v. Millard*, 10 Wall, 152, p. 156.

action. If it were true that there was a privity of contract between the banker and holder when the check was given, the bank would be obliged to pay the check, although the drawer before it was presented had countermanded it, and although other checks, drawn after it was issued, but before payment of it was demanded, had exhausted the funds of the depositor. If such a result should follow the giving of checks, it is easy to see that bankers would be compelled to abandon altogether the business of keeping deposit accounts for their customers. If then, the bank did not contract with the holder of the check to pay it at the time it was given, how can it be said that it owes any duty to the holder until the check is presented and accepted? The right of the depositor, as was said by an eminent judge, is a chose in action<sup>1</sup> and his check does not transfer the debt or give a lien upon it to a third person without the assent of the depository. This is a well-established principle of law."

(b) *Massachusetts*. Shortly afterward the Supreme Court of Massachusetts considered the same question.<sup>2</sup> Judge Gray remarked that "it is a general rule of law that upon a promise made by one person to another for the benefit of a third from whom no consideration moves, the latter cannot sue; and the exception to this rule, which holds a person, in whose hands funds have been placed to pay creditors of the depositor, liable to actions by them, has not been extended in this Commonwealth or in England, to a case in which neither such creditors nor the amounts of their debts are named or ascertained at the date of the promise. . . The relation between the defendants and the drawer [in this case] was simply the ordinary one of banker and customer, which is a relation of debtor and creditor, not of agent and principal. The bankers agree with their customer to receive his deposits, to account with him for them, to repay them to him on demand, and to honor his checks to the amount for which

<sup>1</sup> That is, a right which can be legally maintained.

<sup>2</sup> *Carr v. National Security Bank*, 107 Mass. 45.

they are accountable to him when the checks are presented; and for any breach of that agreement they are liable to an action by him. But the money deposited becomes the absolute property of the bankers, impressed with no trust, and which they may dispose of at their pleasure, subject only to their personal obligation to the depositor to pay an equivalent sum upon his demand or order. The right of the bankers to use the money for their own benefit is the very consideration for their promise to the depositor. They make no agreement with the holders of his checks. A check drawn by him in common form, not designating any special fund out of which it is to be paid, nor corresponding to the whole amount due to him from the bankers at the time, is a mere contract between the drawer and payee, on which, if payable to bearer, and not paid by the drawees, any holder might doubtless sue the drawer, but which possess no title, legal or equitable, to the payee or holder in the moneys previously paid to the bankers by the drawer; and the bankers' promise to the drawer to honor his checks does not render them, while still liable to account with him for the amount of any check as part of his general balance, liable to an action of contract by the holder also, unless they have made a direct promise to the latter, by accepting the check when presented, or otherwise."<sup>1</sup>

(c) *Alabama*. Thus the law is clearly established that the holder of a check cannot maintain an action against the bank on which it is drawn unless the bank has accepted it. Says Judge Clopton of the Supreme Court of Alabama:<sup>2</sup> "The check, although drawn and delivered to the payee, payable to his order, did not operate without acceptance by the drawee as an assignment of the sum for which it was given, though the drawer may have had funds in the possession of the drawee of an equal or larger amount. There

<sup>1</sup> *Creveling v. Bloomsbury Nat. Bank*, 46 N. J. Law, 255. Many authorities are cited in the opinion of the court in this case.

<sup>2</sup> *National Com. Bank v. Miller*, 77 Ala. 168, p. 172.

being no privity, express or implied, the holder of the check in its original form can bring no suit on the check against the drawee; even if it be conceded that he may maintain an action for any special injury by reason of the omission of the drawee to perform a legal duty. In case of non-payment the recourse of the holder is against the drawer, and the indorser, if any. The drawer alone can bring suit to recover the funds against which the check was drawn; and, ordinarily, he only can maintain an action for a failure to pay on presentment. He may revoke the check and countermand its payment before acceptance; and, if unaccepted, his death operates a revocation."<sup>1</sup>

§ 342. **When check is assignment of deposit holder can sue.** In several of the States, though, the delivery of a check operates as an assignment of the maker's deposit to the extent named therein, and wherever this is the law the check holder can sue the bank for the amount. Illinois<sup>2</sup> led off in establishing this rule, and Iowa,<sup>3</sup> Kentucky,<sup>4</sup> and South Carolina<sup>5</sup> have followed, but the other rule prevails in far more of the States<sup>6</sup> and also in England.

<sup>1</sup> A bank check drawn only for a part of the drawer's fund does not operate either at law or in equity as an assignment of the deposit *pro tanto*, or confer any lien thereon, *Coates v. Doran*, 83 Mo. 337; *Reaff. Dickinson v. Coates*, 79 Id. 250.

<sup>2</sup> *Munn v. Burch*, 25 Ill. 35. But *Cooley, C. J.*, in *Grammel v. Carmer*, 55 Mich. 201, p. 203, said: "An examination of the facts in that case will show very clearly that the question supposed to have been decided by it did not arise at all, for the check which was in question had actually been received by the bank on which it was drawn and actually charged up to him on his pass-book. The court went beyond the case and expressed an unnecessary opinion." *National Bank v. Indiana Banking Co.*, 114 Ill. 483; *Union Nat. Bank v. Oceana County Bank*, 80 Id. 212; *Shaffner v. Edgerton*, 13 Brad. 132.

<sup>3</sup> *Roberts v. Corbin*, 26 Iowa, 315.

<sup>4</sup> *Buckner v. Sayre*, 18 B. Mon. (Ky.) 745; *Lester v. Jones*, 8 Bush, 357. Judge Norton in reviewing these cases in *Dickinson v. Coates*, 79 Mo. p. 257, said that the decision in the second case was based on that made in the first, and that case was "in accord with the New York and like cases." *Weinstock v. Bellwood*, 12 Bush, 139.

<sup>5</sup> *Fogarties v. Stillman*, 12 Rich. 518.

<sup>6</sup> *Chapman v. White*, 6 New York, 412; *Tyler v. Gould*, 48 Id. 682; *Ætna*

§ 343. **Can sue after acceptance.** (a) *Pennsylvania cases.* But if the bank, expressly or impliedly, promise the drawer to pay the check, the holder may sue whenever payment is refused. Thus, when a check was drawn to C., and B. indorsed C.'s name without authority and received the money, and the bank deducted the check from the drawer's account and settled with him on that basis, it was held that these acts were an acceptance, and that C. could recover from the bank.<sup>1</sup> When a depositor settles his account with the bank, and leaves the exact amount of an outstanding check for its payment, and the bank tacitly retains the money and settles on that basis, it is liable to the holder on the implied acceptance. All parties to a check may naturally infer from such action that a bank has retained the money for the use of the holder.<sup>2</sup>

Nat. Bank *v.* Fourth Nat. Bank, 46 Id. 82; Ketchum *v.* Stevens, 19 N. Y. 499; Butterworth *v.* Peck, 5 Bosw. 341; Harrison *v.* Wright, 100 Indiana, 515, in which Zollars, C. J., delivered an elaborate opinion reviewing most of the cases; National Bank *v.* Second Nat. Bank, 69 Id. 479; Moses *v.* Franklin Bank, 34 Maryland, 574; Bush *v.* Foote, 58 Mississippi, 5; Dickinson *v.* Coates, 79 Missouri, 250; Merchants' Nat. Bank *v.* Coates, Id. 168; Coates *v.* Doran, 83 Id. 337. The St. Louis Court of Appeals in these cases had held to the contrary, adopting the Illinois view, Senter *v.* Continental Bank, 7 Mo. App. 532; McGrade *v.* German Sav. Institution, 4 Id. 330; Zelle *v.* German Sav. Institution, Id. 401; Colorado Nat. Bank *v.* Boettcher, 5 Colorado, 185; Case *v.* Henderson, 23 Louisiana Ann. 49. In Ohio the Supreme Court has rendered no decision on the subject. In Morrisons *v.* Bailey, 5 Ohio St. 13, p. 18, and in Gardner *v.* City Nat. Bank, 39 Id. 600, p. 603, a remark or two was made, but it need hardly be said that such passing utterances neither have nor are intended to have the authority of decisions. The Superior Court of Cincinnati in McGregor *v.* Loomis, 1 Disney, 247, p. 255, have declared that they "can see no just reason why the holder of a check for value, who has taken it in the faith that the drawee was not only able but willing to honor it, should not, when he has notified the banker, be permitted to hold the specific fund appropriated by the terms of the check." See review of this case by Brown, J., *In re* Smith, 15 N. Bank. Reg. 459, p. 465; First Nat. Bank *v.* Gish, 72 Pa. 13. The rule in England may be found in Hopkison *v.* Forster, L. R., 19 Eq. Cas. 74. In Michigan the question has been considered but not decided, Grammel *v.* Carmer, 55 Mich. 201; Strain *v.* Gourdin, 11 N. Bank. Reg. 156.

<sup>1</sup> Seventh Nat. Bank *v.* Cook, 73 Pa. 483.

<sup>2</sup> Saylor *v.* Bushong, 100 Id. 23.

(b) *Acceptance is question of fact.* Acceptance is a question of fact to be determined in each case. It has been decided that the placing of a check on the cancelling fork by the cashier of the bank on which it is drawn is not such an acceptance as will prevent him from correcting the mistake and declining to pay on learning that the drawer has not sufficient funds for the purpose.<sup>1</sup> In another case the holder of a check deposited it in the Bank of Commerce of New York to be transmitted for presentation to a bank in Hoboken, New Jersey. The Bank of Commerce with the same view passed it to the Ocean Bank of the same city, by which, on the 31st of October, between twelve and one o'clock, it was delivered to a messenger of the Hoboken bank. The check was retained by it until about twelve o'clock the following day, when it was returned to the Ocean Bank marked "not good." At ten o'clock the next morning it returned the check to the Bank of Commerce which immediately notified Overman that the check had been dishonored. In a suit to recover thereon it was decided that the delay of the bank in returning the check in question was not of such a character that the law would imply from it an acceptance.<sup>2</sup>

§ 344. **Draft does not assign fund in drawee's possession.** (a) *Gammel v. Carmer.* An attempt has been made to include drafts in the rule that a check works an assignment of the maker's deposit from the time of issuing the instrument. This was tried in Michigan,<sup>3</sup> but failed. The court declared that there was no privity of contract between the payee and drawee of an unaccepted sight draft drawn by a banker even though the drawee has ample funds to pay it. But if the principle be established that a check works an assignment, and which has been as we have seen in some States, it will be very difficult to draw a line between checks and drafts in many cases. For, as the elements of the two instruments are

<sup>1</sup> *National Bank v. Second Nat. Bank*, 69 Ind. 479, the court citing *Bellamy v. Marjoribanks*, 7 Ex. 389; *Warwick v. Rogers*, 5 Man. & G. 340.

<sup>2</sup> *Overman v. Hoboken City Bank*, 31 N. J. Law, 563; *Aff.* 30 Id. 61.

<sup>3</sup> *Gammel v. Carmer*, 55 Mich. 201.

quite the same, if the drawee has funds of the drawer why should not one instrument operate as an assignment as perfectly as the other. The following case will show the difficulty in maintaining the distinction.<sup>1</sup>

(b) *Gardner v. City National Bank*.<sup>2</sup> H. desiring money, procured it by giving his draft to the City National Bank of Cleveland, Ohio. It was drawn on a banker in Philadelphia for the full amount of his deposit in that place. Before the draft was presented by the Cleveland bank the Philadelphia banker remitted the amount by a certified check to H. He deposited this in the Merchants' Bank of Cleveland, as cash, and in due time the check was paid. After making other deposits in the Merchants' Bank and checking out sums from time to time, H. failed. In an action for equitable relief brought by the City bank against the assignee and the Merchants' Bank, the court held that as between H. and the City bank it was his manifest intention to transfer the absolute right to receive the amount from the Philadelphia banker, and, therefore, that the draft should operate as an equitable assignment of the funds in the possession of the latter, and that when H. received them in the form of a certified check as above mentioned he should have delivered it to the City bank. This decision was obviously just and in harmony with the general principle that when checks or other instruments are deposited for collection, either when this is expressly stated or implied, and advances are made on the expectation of collecting them, that the bank has a lien on the proceeds for whatever has been advanced. But was this instrument given to the City

<sup>1</sup> N. kept a banking account with H. with whom he arranged for credit needful in his business. Becoming indebted to E., N. drew his check for the amount and deposited it with H. receiving in exchange a draft on a bank in Chicago, which he intended to give to E., but did not. In a suit by E. against H. based on the check drawn by it, it was held that there was no privity between the plaintiff and defendant, and no such setting apart of funds for the plaintiff's benefit would make the banker liable, *Hogue v. Edwards*, 9 Brad. 263.

<sup>2</sup> 39 Ohio St. 600.

bank on the Philadelphia banker a draft or a check? and would the rights of the parties have been different if it had been treated as a check instead of a draft? It would not if advances had been made thereon, but, suppose none had been made, what then? In the States which do not recognize this doctrine of a check working an assignment, of course the City bank would have had no remedy against the assignee or the Philadelphia banker in the event that he had not paid H.; but in the States which do recognize the doctrine of the assignment of deposits by check, it is difficult to perceive how they could have drawn any distinction between this and the ordinary assignment of deposits by issuing checks.<sup>1</sup>

(c) *Nor does check when deposit is unpaid credit.* Even though there may be an assignment of a deposit by check, the holder can claim nothing if the deposit consist simply of a credit given to the depositor for drafts which were not paid.<sup>2</sup>

§ 345. **If drawer fail who can take deposit.** (a) *Rule in National Courts.* If the maker fail before his check is paid, then the courts will often go further to protect the drawee bank in paying the amount to the check holder instead of the assignee. Whenever a bank has been in doubt who to pay in such cases, it has resorted to a legal action, called a bill of interpleader, to have the question determined. Such an action was brought by the German Savings Institution against Adae & Co.,<sup>3</sup> insolvents, to determine whether a check which they had given on the above-named bank to Newman & Co. should be paid to them or to Adae & Co.'s assignee. The court said that if this were an action by a check holder against the bank on the check, there could be no recovery. But such was not the case. It was a bill of interpleader in equity, by which the bank holding the fund in question, declared its

<sup>1</sup> *Weinstock v. Bellwood*, 12 Bush, 139.

<sup>2</sup> *Jacob v. First Nat. Bank*, Hamilton Co. Dis. Ct., Ohio, 3 Bull. 274.

<sup>3</sup> 8 Fed. Rep. 106. This doctrine of equitable assignment was sanctioned in *Pease v. Landauer*, 63 Wis. 20; but the case is no authority, for the other rule, that the giving of a check in the ordinary course of business works an assignment.



readiness to pay as the court might order, and the controversy related to the equities of the different claimants of the fund. The rule which protects a bank from being harassed by suits brought by check holders had no application to the case. "We are at liberty, therefore," continued the court, "to inquire which of the claimants here has the better right in equity to the fund in question. There are, undoubtedly, numerous respectable authorities which sustain the doctrine that the execution of a check in the ordinary form, not describing any particular fund, does not operate as an assignment, equitable or otherwise, of funds of the drawer in the hands of the drawee. On the contrary, it was held by this court<sup>1</sup> that the rule thus broadly stated seems to apply only to cases at law, and 'that such an order, as soon as notice is given to the drawee, works an assignment in equity,' and this view is well sustained by authority."<sup>2</sup>

(b) *Discussion continued.* "There is certainly no ground for holding that a check or a draft drawn upon a fund in bank is not an equitable assignment as between the drawer and payee; and in a case where there is no controversy as to the rights of the bank or drawee, it does not lie in the mouth of the drawer or his assignee to say that such an instrument is not an equitable assignment. If it were conceded that, as a general rule, a check drawn upon a part of a fund in bank will not of itself operate as an assignment *pro tanto*, it is very clear to my mind that this is a case which a court of equity might well regard as an exception to any such general rule. As already suggested, the holder of the fund has come voluntarily into a court of equity, bringing the fund with him, and, disclaiming all interest in it, asks the court to dispose of it as between the check holder and the assignee, according to equity." Not long after the rendering of this de-

<sup>1</sup> Walker v. Siegel, 2 Cent. L. J. 508.

<sup>2</sup> "A bill of exchange or check is not an equitable assignment *pro tanto* of the funds of the drawer in the hands of the drawee," Christmas v. Russell, 14 Wall. 69, p. 84.

cision, Judge Miller, when holding the United States Circuit Court, decided the question in the same manner.<sup>1</sup>

(c) *Check holder must notify bank in order to hold it.* But a check does not operate as an equitable assignment of the drawer's deposit until the bank has been notified that the check has been drawn. In the words of Judge Miller:<sup>2</sup> "However this doctrine may operate to secure an equitable interest in the fund deposited in the bank to the credit of the drawer after notice to the bank of the check, or presentation to it for payment, we are of opinion that, as to the bank itself, the holder of the fund, and its duties and obligations in regard to it, the bank remains unaffected by the execution of such a check until notice has been given to it, or demand made upon it for its payment."

(d) *Effect of maker's insolvency before notice to or demand of bank.* But if the drawer assign before such a notice has been received by the bank or a demand has been made thereon, the holder of the check has no superior equity to other creditors. Says Judge Miller: "It is not easy to see any valid reason why the assignment of an insolvent debtor for the equal benefit of all his creditors, and all his property, does not confer on those creditors an equity equal to that of the holder of an unpaid check upon his banker." On the occasion of this remark no superior right was acquired by receiving a check before the maker's assignment.

(e) *Check dated before but given after assignment.* If, however, a check be dated before the depositor has made an assignment, though given afterwards, and the bank does not know this at the time of its presentation for payment, but only that the depositor has failed, it ought nevertheless not to pay such a check.<sup>3</sup> Thus L. & Co. made an assignment on the 26th of September. Three days afterward they gave their check to H., but dated it September 22d. On the 29th the bank, on

<sup>1</sup> First Nat. Bank v. Coates, 8 Fed. Rep. 540.

<sup>2</sup> Schuler v. Laclede Bank, 120 U. S. 511.

<sup>3</sup> Chaffee v. Bank, 40 Ohio St. 1.

which it was drawn, paid it knowing of the assignment, but not that the check was wrongly dated. L. & Co.'s assignee recovered all the money they had on deposit at the date of the assignment, the court saying that the bank, having knowledge of that event, should have made inquiry about the check before paying it.<sup>1</sup>

§ 346. **Equitable assignment not recognized anywhere.** Unhappily, this rule has not been recognized by all the courts. In a Pennsylvania case<sup>2</sup> a check was made on the 27th of March; on the 3d of April the maker failed; and two days afterward the check was presented to the bank on which it was drawn for payment. The court held that there had been no appropriation of money to the payee, and that the funds in the bank belonging to the maker of the check passed to his assignee. The same rule had previously been laid down in New York in *Lunt v. Bank of North America*.<sup>3</sup> The court in that case considered the question fully, and decided that a check drawn in the ordinary form, not describing a particular fund, and containing only the usual request to the bank to pay to the order of the payee therein named, was the same in legal effect as an inland bill of exchange, and did not amount to an assignment of the funds of the drawer in the bank. The plaintiff was the assignee of the makers of two checks which were payable to the Bank of North America. When the makers failed, notice of the assignment was given to the bank on which the checks were drawn, but the money was paid over, the lower court having decided that it could be legally done. As the Supreme Court reversed this decision, the payees were obliged to refund the money to the assignee. At a later date the cases were reviewed,<sup>4</sup> and the rule laid down in *Lunt v. Bank of North America* was declared to be the settled law of the State. Chief Justice Church in giving the opinion of the court said: "This doctrine accords

<sup>1</sup> *Chaffee v. Bank*, 40 Ohio St. 1.

<sup>2</sup> *First Nat. Bank v. Gish*, 72 Pa. 13.

<sup>3</sup> 49 Barb. 221.

<sup>4</sup> *People ex rel. Attorney-General v. Continental Life Ins. Co.*, 71 N. Y. 325, p. 331.

with the relations between the parties. Banks are debtors to their customers for the amount of deposits. A check is a request of the customer to pay the whole or a portion of such indebtedness to the bearer, or to the order of the payee. Until presented and accepted, it is inchoate; it vests no title or interest, legal or equitable, in the payee to the fund. Before acceptance the drawer may withdraw his deposit; the bank owes no duty to the holder of a check until it is presented for payment."<sup>1</sup>

§ 347. **But is when check is drawn on particular funds.** (a) *Opinion of Talcott, P. J.* Although in New York the courts have steadily tried to resist every claim by the check holder to the drawer's money before acceptance of his check by the drawee, yet in some cases the justice of exempting checks from the operation of the general rule has been so great that the courts have shrunk from applying it. A small door has been opened whereby the holders of checks drawn on a specific fund may be paid.<sup>2</sup> The exception is thus stated: "Though an ordinary bill of exchange, or check on a bank, does not operate as an equitable assignment of so much money, so as to vest the title in the payee without acceptance; yet, when a particular fund is specified, out of which the amount is payable, or the source from which the payment is to be derived, the order operates as an equitable assignment of the fund, or so much as is necessary to satisfy the draft with or without acceptance by the drawee; and so operating it transfers the fund, so that the drawee, having notice of the draft, is bound to keep the fund, as upon a special deposit, in his hands for the benefit of the payee." So, too, in New Jersey if an order be drawn by a creditor on his debtor directing him to pay money from a specified sum or fund and which is presented to, though not accepted by the debtor, in equity the money is assigned to the person having the order.<sup>3</sup>

<sup>1</sup> *Randolph v. Canby*, 11 N. Y. Bank. Reg. 296.

<sup>2</sup> *Ballou v. Boland*, 14 Hun, p. 359.

<sup>3</sup> *Kirtland v. Moore*, 40 N. J. Eq. 106.

(b) In *Ballou v. Boland*,<sup>1</sup> a contractor had agreed to build a school-house who sublet a portion of the work to Boland. The contractor drew a draft on the treasurer who was to pay for the building. This was held to be an equitable assignment of the amount to Boland. In *Hall v. The City of Buffalo*,<sup>2</sup> a city contractor had drawn orders in favor of several persons on funds due to him from the city, which were directed to the comptroller and duly presented to, and attached by him to the drawer's contracts. It was held that the city had notice of the claims of these persons and was liable therefor to the amount unpaid to the contractor. Chief Justice Denio,<sup>3</sup> after reviewing several cases, further remarks that, "passing over a considerable period of time we come to *Lett v. Morris*,<sup>4</sup> where a builder, who was erecting a house under a contract, gave an order to one who had furnished him with lumber, for certain sums out of moneys which would become payable to him on the contract. It was held a good equitable assignment, and so much of these moneys as the orders called for was decreed to be paid to the holder of the order." See also, to the same general purport, *Burn v. Carvalho*,<sup>5</sup> and *Rodick v. Gandell*.<sup>6</sup> In the first of these cases Lord Chancellor Cottenham laid down the equitable principle in these words: 'In equity, an order given by a debtor to his creditor upon a third person having funds of the debtor to pay the creditor out of such funds is a binding equitable assignment of so much of the fund.' Continuing his review of English cases of the same purport he concludes that the principle of them "has been adopted and frequently acted on in this country." Thus, in Iowa, a check drawn on a particular fund operates as an assignment of it. No particular form of words is necessary to create it, "anything which evinces an intent to do so is sufficient."<sup>7</sup>

<sup>1</sup> 14 Hun, 355.<sup>2</sup> 1 Keyes, 193.<sup>3</sup> Id. p. 198.<sup>4</sup> Sim. 607.<sup>5</sup> My. & Cr. 490.<sup>6</sup> 1 De Gex, M. & G. 763.<sup>7</sup> *County of Des Moines v. Hinkley*, 62 Iowa, 637; *Moore v. Lowrey*, 25 Id. 336; *McWilliams v. Webb*, 32 Id. 577; *First Nat. Bank v. D. & S. W. R. Co.*, 52 Id. 378.

(c) *If money is deposited for a particular purpose depositor's assignee cannot withdraw it.* When money has been deposited for a specific purpose, the most of which has been applied as the depositor directed, the remainder on his failure cannot be otherwise applied by his assignee. Thus the Erie Railway Company declared a dividend on its stock and left the money with a banking house to pay it. Before all the stockholders had received their dividend a receiver of the company was appointed. The money in the possession of the banking house was withdrawn by the company and subsequently passed with its other property to the receiver. In a suit by one of the stockholders who had not received his dividend, it was held that the fund deposited with the banking house should be regarded as specially appropriated for the payment of a dividend made by the company and that the stockholders acquired in equity a lien thereon which they could follow into the hands of the receiver.<sup>1</sup>

§ 348. **When funds are insufficient can owner of check or note claim them.** When a bank holds a note that is due and on the same day a check is presented for payment drawn by the maker of the note, and the deposit is insufficient to pay both, which shall the bank pay, the note or the check? Judge Brewer has thus answered the question:<sup>2</sup> "I think that it is equitable for a bank, upon the day on which a note becomes due, and at any time during the day, having funds of the maker in its possession, to apply those funds to the payment of that note, although by so doing it leaves nothing standing to the credit of the maker to apply on checks drawn by him. As between the bank, the holder of a note due, and the payee of a check upon that bank, the equities are in favor of the bank. Or, at least, if the equities are equal, legal title to the funds and possession, is with the bank, and it should not be postponed."

<sup>1</sup> Matter of Le Blanc, 14 Hun, 8; Le Roy v. Globe Ins. Co., 2 Edw. Ch. 657; Lowene v. American Fire Ins. Co., 6 Paige, 482.; see also People ex rel. Attorney-General v. Continental Life Ins. Co., 71 N. Y. 325.

<sup>2</sup> Schuler v. Laclede Bank, 27 Fed. Rep. 424; Rev. on another point, see § 345, c.

§ 349. **Operation of check of insolvent bank.** (a) *Case of bill of exchange.* Having shown what principles apply to the checks of insolvent personal debtors, we may inquire whether different ones apply to the checks of banks that become insolvent. When a bank draws a bill of exchange in favor of a depositor on a person who has funds to meet it, this is held to be not such an assignment or appropriation of a particular fund as to vest the property therein in the payee as against a subsequent assignee of the bank for the benefit of creditors.<sup>1</sup>

(b) *Payee of bill cannot be remitted to his original status.* When an insolvent bank draws a bill of exchange in favor of a depositor on a business correspondent with whom it has a deposit, and the bill is dishonored on presentation because of the bank's insolvency, the payee cannot rescind the contract and be remitted to his original status as a depositor. And this is so especially when it is shown that no intentional fraud or deception was practised on him and that the bank had no reasonable expectation of the dishonoring of the bill.<sup>2</sup>

§ 350. **Lender of check cannot recover of bank.** As the holder of a check cannot recover of the bank on which it is drawn, neither can the lender of a check recover of the depository bank even though the loan was made on the faith of forged securities provided the bank had no knowledge of the fraud.<sup>3</sup>

<sup>1</sup> *Ex parte Jones*, 77 Ala. 330.

<sup>2</sup> *Id.*

<sup>3</sup> *Justh v. National Bank*, 56 N. Y. 478; *Aff.* 36 N. Y. Sup. Ct. 273.

## CHAPTER XV.

## WHEN A BANK CAN RECOVER MONEY PAID BY MISTAKE.

§ 351. **Can generally be recovered.** Money paid under a mistake of fact generally may be recovered although the payor had the means of avoiding it. If, however, he pays it intentionally and without choosing to make a proper investigation that would save him from error he cannot recover.<sup>1</sup> Mere negligence in making the mistake will not preclude the payor from demanding its correction. It does not give to the receiver the right to retain what is not due unless he has been misled or prejudiced thereby.<sup>2</sup>

§ 352. **Money paid on forged checks cannot be recovered.** Of course this rule, as we have seen, cannot be applied by a bank to recover of the drawer and depositor money paid on forged checks and indorsements or on those of a correspondent. Says Judge Rapallo:<sup>3</sup> "It has been decided that the drawee is bound to know the signature of the drawer and that if he accepts or pays he cannot recall his act.<sup>4</sup> So also it has been held that if one pays a draft purporting to be accepted by him he cannot afterward set up that the acceptance was a forgery as against a *bona fide* holder to whom the payment was made. That he was bound to know his own signature.<sup>5</sup> And further that if a bank purports to be its own bills or receives them on deposit and passes them to the credit of its customer

<sup>1</sup> Meredith v. Haines, Pa. Sup. Ct., 14 Week. No. Cas. 364; Kelly v. Solari, 9 Mees. & Wels. 54; Waite v. Leggett, 8 Cow. 195; Bell v. Gardiner, 4 Man. & G. 11; Boylston Nat. Bank v. Richardson, 101 Mass. 287.

<sup>2</sup> National Bank v. National Mechanics' Bank. Ass'n, 55 N. Y. p. 213.

<sup>3</sup> Id.

<sup>4</sup> Price v. Neal, 3 Burr, 1354; National Park Bank v. Ninth Nat. Bank, 46 N. Y. 77.

<sup>5</sup> Mather v. Lord Maidstone, 18 Com. B. N. S. 273.



it cannot recall the payment or revoke the credit on subsequently discovering that the bills had been fraudulently altered by raising their amounts."<sup>1</sup>

§ 353. **Raised check.** But if a person pass a raised bill or check to a bank, especially when it is drawn thereon, and it is paid on the faith of the presentor's indorsement, the excess can be recovered unless damage would result therefrom to the person who received it. There is no duty or obligation of the bank to pay the wrongful amount, and, consequently, however innocent the presentor of the check may be, he must refund unless he can show that by so doing his condition would be worse than it would have been had the bank declined to pay the check on presentation.<sup>2</sup>

§ 354. **Raised draft.** But if a person buy a draft of a bank which is afterward raised it cannot hold him for the excess. Thus B., of Texas, desirous of remitting a present of \$500 to his son-in-law who lived in New York, purchased a draft of a bank for the amount. The draft and letter accompanying it were put in an envelope, which was directed by the cashier at the sender's request, to the son-in-law, and mailed with the bank mail. The figures \$500 were by some unauthorized person afterward changed to \$5000, and the draft for that amount was paid in New York. The mistake was discovered by the bank about a month afterward. B. was a depositor in the bank, and in an action to recover his deposit the bank sought to make him liable for \$4500, the excess in the draft. But the court held that no contract existed between the parties which rendered B. liable for the amount, and that having received no benefit from the mistake, he could not be made liable for any fraud the payee committed.<sup>3</sup>

§ 355. **Reasonable diligence must be used to recover on raised check.** (a) *Rule stated by Wagner, J.* In demanding payment of one who has passed a raised check, and especially of one

<sup>1</sup> United States Bank v. Bank of Georgia, 10 Wheat. 333. For recovery of money paid on forged check see §§ 197-200.

<sup>2</sup> National Bank v. National Mechanics' Bank. Ass'n, 55 N. Y. 211.

<sup>3</sup> City Nat. Bank v. Stout, 61 Texas, 567.

to whom payment has been made on the faith of his indorsement, only reasonable diligence is required. Whenever that has been exercised and no injury has resulted from the delay the amount erroneously paid can be recovered.<sup>1</sup> "The accepted rule is<sup>2</sup> that the payor must be allowed a reasonable time to detect the forgery and demand restitution. What will amount to a reasonable time will greatly depend on the circumstances of each particular case. It is conceded, at all events, that it is not necessarily the very day of payment, nor the day after. For one who passes a forged bill, it is said, cannot avoid his liability on pretence of delay in detecting the forgery and giving notice; and reasonable diligence is all that can be required. Therefore where no negligence is imputable to the drawee in failing to detect the forgery, want of notice within the time which ordinarily charges previous parties on negotiable paper is excused, provided it be given to the holder as soon as the forgery is discovered."<sup>3</sup> This rule was applied in the following case: A bank, having paid a check to a stranger, collected the amount from the bank on which it was drawn. It proved to be a forgery, but at the time of payment, neither bank knew or suspected this. The next day the paying bank learned that the check was forged, and on that day or the one succeeding, notified the other bank of the fact. This notification was declared to have been given in a reasonable time and that the money could be recovered.

(b) *Demand must be made.* Whenever money is thus paid a demand is necessary before bringing an action for its recovery. The Statute of Limitations begins to run against money paid in this way from the time of payment unless

<sup>1</sup> City Bank v. First Nat. Bank, 45 Texas, 203. The rule is absolute that when money is paid on a forged draft, where the parties are in mutual fault and are equally bound to payment, it can always be recovered back, Redington v. Woods, 45 Cal. 406.

<sup>2</sup> Third Nat. Bank v. Allen, 39 Mo. 310.

<sup>3</sup> Canal Bank v. Bank of Albany, 1 Hill, 287; United States Bank v. Bank of Georgia, 10 Wheat. 333; Bank of Commerce v. Union Bank, 3 N. Y. 230; Espy v. Bank, 18 Wall. 604.

there be a fraudulent concealment of the knowledge surrounding the transaction.<sup>1</sup>

(c) *In whose name suit should be brought.* When a bank acts as the agent of another in presenting drafts for payment and it is afterward necessary to bring an action to recover the difference between the original amount stated in a draft and the raised amount that is paid, the agent-bank is the proper plaintiff.<sup>2</sup>

§ 356. **Mistake is question of fact.** The principal question in the cases to recover is, was the money paid by mistake? As previously stated, want of care in making payment will not prevent a recovery.<sup>3</sup>

(a) *Union National Bank v. Sixth National Bank.*<sup>4</sup> A bank in Troy received from its correspondent, a bank in New York, a note for collection, the maker of which lived thirty miles distant. The bank sent the note to a third and corresponding bank at the residence of the maker. Failing to pay the note at maturity, that bank caused it to be protested, and notice of protest was duly sent to the indorsers in New York and to the Troy and New York banks above mentioned. The Troy bank; however, by some miscarriage did not receive the notice, and supposing the note had been paid remitted the amount to its New York correspondent. But it recovered the money. Moreover, the fact that the New York bank had received the amount of the note from an indorser, which was afterward refunded on receiving the remittance from the Troy bank, did not defeat a recovery in the absence of any proof that the indorser was not yet liable and responsible to the New York bank.

(b) *Harley v. Eleventh Ward Bank.*<sup>5</sup> In another case, Harley deposited with a New York bank for collection a sight draft which it sent to another bank to be collected. Before collecting the same, but supposing that it had done so, the

<sup>1</sup> *Sturgis v. Preston*, 134 Mass. 372.

<sup>2</sup> *First Nat. Bank v. Continental Nat. Bank*, 17 Week. Dig. 42.

<sup>3</sup> § 351.

<sup>4</sup> 43 N. Y. 452.

<sup>5</sup> 76 Id. 618; Aff. 7 Daly, 476.

second bank credited the amount to the New York bank, which, in turn, also credited Harley's account for the same amount. The second bank having discovered its mistake, charged back the amount to the New York bank, but Harley having been notified of the mistake, refused to take back the draft or have the amount charged to his account. The New York bank accused the other bank of delay in not returning the draft and stated that it would be compelled to demand payment thereof, and afterward rendered Harley an account without charging the draft back to him, and continued to render accounts to him for two years in the same way. Subsequently, in a suit by Harley against the New York bank, the court held that it was precluded from denying its liability for the amount.

(c) *De Nayer v. State National Bank.*<sup>1</sup> C., a debtor of D., drew a draft on E., of St. Louis, for the amount of a debt payable in thirty days from date. He delivered it to D., who deposited it in a bank for collection. Before its maturity D. was notified that it had been paid and he drew a portion of the money. C., who was insolvent, having been notified of the payment of the draft, called at the bank before its maturity and expressed surprise at what had happened, and said that he was anxious to protect the draft, and that if it was not paid he had some money which he intended to keep for the protection of it. He was told that it had been paid, but it was returned unpaid. The bank then sued D., to recover the money paid above mentioned, and it was held that as D. had lost no rights against C. in consequence of the mistake, the bank could recover the money thus paid on the supposition that the draft had been discharged.<sup>2</sup>

(d) *Wetherill v. Bank.*<sup>2</sup> A. deposited a note in a bank for collection which at maturity was entered by the bank's mistake in the bank-book of the depositor to his credit as paid. The bank, discovering the mistake, erased the credit

<sup>1</sup> 8 Neb. 104.

<sup>2</sup> 1 Miles, 399.

from the depositor's book. He however gave notice to the bank that he held it responsible for the amount and drew a check therefor which the bank refused to pay. The bank then sued the drawer of the note and afterward his bail bond, but in neither suit recovered anything. The court held that the bank was liable to the depositor for two reasons: first, by instituting the suits mentioned it assumed the property in the note; and second, by reason of the lapse of time between the date of the maturity of the note and notice to the depositor of the mistake in crediting his account with the amount.

(e) *Payment of larger sum than stated in check.* If the general manager of a corporation having authority among other things to collect money on checks for his corporation presents a check for \$300 to the drawee bank and the paying teller by mistake pays \$800, the bank can recover \$500, whether the general manager ever accounted to the corporation for the excess or not.<sup>1</sup> Money paid with the full knowledge of the facts but under a mistake of law cannot be recovered.<sup>2</sup>

§ 357. **Who should sue for over-payment.** The suit to recover an over-payment should be brought in the name of the paying bank and not in the name of the drawer of the check.<sup>3</sup>

§ 358. **Payment of draft by mistake.** (a) *Citizens' Bank v. Grafflin.*<sup>4</sup> The Citizens' Bank held a draft of M. on C., of Newburyport, Mass., dated May 31st, 1867, and payable to their order ninety days after date at a Boston bank, on their indorsement. The draft was discounted by the defendant, on the 22d of July, 1867, and having been presented for acceptance, but not accepted, it was protested for non-acceptance. When the draft matured it was protested for non-payment on the 4th of September following. After the maturity of the draft the defendant informed the bank that it had not been paid, and requested the institution to make it good, which was done. On the next day the defendant sent the draft with the

<sup>1</sup> *Kansas Lumber Co. v. Central Bank*, 34 Kansas, 635.

<sup>2</sup> *Mutual Savings Institution v. Enslin*, 46 Mo. 200.

<sup>3</sup> *Keene v. Collier*, 1 Met. (Ky.) 415.

<sup>4</sup> 31 Md. 507.

protest to the bank. The draft was paid by the bank, in ignorance that it had been protested in July for non-acceptance. As soon as it ascertained this fact, it informed the defendant that the draft had been paid in ignorance, and demanded a return of the money. The defendant having refused to return it, the bank sued him and recovered. The court held that if the bank had paid the money in ignorance of the presentation and non-acceptance of the draft in July, and on the fact that no notice had been duly given to it through the post-office or otherwise, it could recover.

(b) *Stephenson v. Mount*.<sup>1</sup> In another case S. received a letter informing him that a draft drawn by the steamboat *Magnolia* for \$1200, was placed in a bank for collection, which he immediately paid, and took the draft. On the same day the holder of the draft called, and the clerk of the bank paid him the money charging no commissions and making no entries of the transaction on the books of the bank. S. afterward learned that the letter and draft paid by him were both forgeries. Nevertheless his action relieved the bank from all liability to him.

§ 359. **Mistake concerning security no ground for recovering money paid.** After accepting and paying a bill the drawee cannot recover the amount from the payee on the ground that he paid it under a mistaken knowledge of the worth of his security, which had proved to be fictitious.<sup>2</sup>

<sup>1</sup> 19 La. Ann. 295.

<sup>2</sup> *First Nat. Bank v. Burkham*, 32 Mich. 328.

## CHAPTER XVI.

## THE STATUTE OF LIMITATIONS.

§ 360. **Does not operate before making demand.** “The engagement of a bank with its depositor is not to pay absolutely and immediately, but when payment shall be required at the banking house. It becomes a mere custodian and is not in default or liable to respond in damages until demand has been made and payment refused. Such are the terms of the contract implied in the transaction of receiving money on deposit, terms necessary alike to the depositor and the banker. And it is only because such is the contract that the bank is not under the obligation of a common debtor to go after its customer and return the deposit wherever he may be found. Hence it follows that no right of action exists and the Statute of Limitations does not begin to run until the demand stipulated for in the contract has been duly made. For this authorities are hardly necessary.”<sup>1</sup>

(a) *When statute will operate without demand.* “Bank checks are not designed or intended to be outstanding for years. The holder has it in his power to make the liability of the drawee absolute at any time. We are not prepared to hold that, by omitting to make the necessary demand, he may suspend the statute for an indefinite period. If he may suspend it as against the drawer it must follow that the statute will also be suspended in the favor of the drawer as against the bank. If the drawer has funds in the bank the latter is

<sup>1</sup> Strong, J., *Girard Bank v. Bank of Penn Township*, 39 Pa. p. 98; *Finkbone's Appeal*, 86 Id. 368; *Humphrey v. County Nat. Bank*, 113 Id. 417; *Thomson v. Bank*, 82 N. Y. 1; *Payne v. Gardiner*, 29 Id. 146; *Howell v. Adams*, 68 N. Y. 314; *Planters' Bank v. Farmers & Mechanics' Bank*, 8 Gill & Johns. 449, second trial 10 Id. 422; *Bank v. Merchants' Nat. Bank*, 91 N. Y. 106; *Brahm v. Adkins*, 77 Ill. 263.

liable to him for refusing payment.<sup>1</sup> A demand after six years cannot be good as against the drawer unless the bank is under an obligation to pay, notwithstanding an unexplained delay for the period of time. But it would be a harsh rule which would make a bank liable to its depositors for refusing to pay out its funds upon a check of that suspicious character. In many cases where the nature of the obligation was such that the party was only bound to pay on demand, it has been held that the statute began to run, although no demand had been made. Those cases proceed upon the principle that as the rule requiring a demand is for the protection of the party sought to be made liable it cannot be used for his annoyance, and the fact that the opposite party omits to make a demand which he can make at any time will not save the statute."<sup>2</sup>

§ 361. **Demand for certifying is not demand for payment.** The demand to have a check certified is not a demand for payment. By certifying the check the deposit represented by it ceases to stand to the credit of the depositor and passes to the credit of the check holder who is thereafter a depositor for that amount with the same rights as any other. A check was drawn October 7th, 1852, and certified but not presented for payment until September 3d, 1859. The bank, though, in October, 1854, paid the money to the original depositor, taking a bond of indemnity from him. The holder, it was declared, was not barred from recovering by the Statute of Limitations; moreover, the taking of the bond was an acknowledgment that the money then remained in the bank to the credit of the holder of the certified check.<sup>3</sup>

With respect to certificates of deposit the statute does not begin to run immediately after issuing them, not indeed until after demand for payment.<sup>4</sup> Moreover, they are sufficient

<sup>1</sup> *Marzetti v. Williams*, 1 Barn. & Ad. 415; *Little v. Phenix Bank*, 2 Hill, 425.

<sup>2</sup> *Smith, J., Brust v. Barrett*, 16 Hun, 409, p. 412.

<sup>3</sup> *Girard Bank v. Bank of Penn Township*, 39 Pa. 92.

<sup>4</sup> *Howell v. Adams*, 68 N. Y. p. 321.



written evidence of the existence of a debt to satisfy the Statute of Limitations relating to written instruments.<sup>1</sup>

§ 362. **Operation on certificate of deposit.** (a) *Difficult cases of deposit or loan.* The question has arisen in at least two cases whether the money received by the depositary was a deposit or a loan. Thus P. delivered to a firm \$1000, for which a paper was given to him acknowledging the receipt of the money and stating that he was credited with the same at six per cent. interest. This transaction was held to be a deposit and not a loan, and the rights and liabilities of the parties were the same as if the money had been in a bank, and hence no right of action existed against the firm until demand was made, and that the statute began to run from the time of making it and not before. If the transaction had been treated as a loan, then the paper would have been considered a promissory note on interest and payable on demand, and against which the statute would not have begun to run until payment was demanded.<sup>2</sup>

(b) *Smiley v. Fry.*<sup>3</sup> In another case an instrument like the following was given by a firm of brokers who received deposits on demand: "Due A., trustee, \$4000, returnable on demand. It is understood that this sum is especially deposited with us and is distinct from the other transactions with said A." This was declared to be a certificate of deposit against which the statute did not begin to run before demanding the amount.

§ 363. **Trust deposits.** When a deposit is made in trust for another how does the statute operate? In *Mabie v. Bailey*,<sup>4</sup> the trustee withdrew the deposit and his executor was subsequently sued by the beneficiary for the amount. He sought to defend himself behind the Statute of Limitations. Said Judge Andrews, who delivered the opinion of the court: "We think the defence of the Statute of Limita-

<sup>1</sup> First Nat. Bank v. Coleman, 11 Brad. 508.

<sup>2</sup> Payne v. Gardiner, 29 N. Y. 146.

<sup>3</sup> 100 Id. 262; Aff. 49 Id. Sup. Ct. 134.

<sup>4</sup> 95 Id. 206.

tions was not made out, supposing the statute applies in such a case. The withdrawal of the deposit was not so far as the case discloses in hostility to the trust. The testator held the legal title to the fund as trustee, and it was competent for him to withdraw it to make another investment, or for any purpose not inconsistent with the trust.<sup>1</sup> There is no evidence that he ever repudiated the trust, and no presumption that he did so can be indulged to let in the defence of the Statute of Limitations. The right of action upon the facts presented did not accrue until the testator's death, which, presumptively, upon the evidence was the period when the trust terminated."<sup>2</sup>

§ 364. **Suspension of specie payments.** The suspension of specie payments and the discontinuing of banking operations are such acts as will, if known by the depositor, set the statute running against him.<sup>3</sup>

(a) *When statute begins to run.* The statute begins to run not from the time of suspension but when the depositor learns of the event.<sup>4</sup>

§ 365. **Notice of unclaimed deposits.** As a new promise will revive a debt barred by the statute, so the publication of unclaimed deposits remaining in a bank in pursuance of law, is an acknowledgment of indebtedness to such depositors as will prevent the bank from interposing the statute in defence to an action for recovering them.<sup>5</sup>

<sup>1</sup> Boone v. Citizens' Sav. Bank, 84 N. Y. 83.

<sup>2</sup> In 1865, Margaret Ganley deposited two treasury notes with the Troy City Nat. Bank for safe keeping, taking a receipt from the cashier which stated that they were to be delivered to her on its surrender. The next year her husband, without her knowledge or subsequent ratification, induced the bank to sell the notes and pay over the proceeds to him without surrendering the receipt. She died in 1869, but no administrator was appointed until 1879, when the plaintiff qualified. The husband died in 1874. Having produced the receipt and demanded the notes of the bank which it refused to deliver, the administrator began his suit. The bank's defence was the Statute of Limitations, which was ineffectual, *Ganley v. Troy City Nat. Bank*, N. Y. Sup. Ct. 20 Week. Dig. 541. Dec. noted but not rep. in 34 Hun, 630.

<sup>3</sup> *Planters' Bank v. Farmers & Mechanics' Bank*, 8 Gill & Johns. 449.

<sup>4</sup> *Union Bank v. Planters' Bank*, 9 Id. 439.

<sup>5</sup> *Adams v. Orange County Bank*, 17 Wend. 514.

§ 366. **When one banking corporation succeeds another.** When one banking corporation takes from another an assignment of all its property, and as a consideration agrees to pay all of the debts and liabilities of the assignor and proceeds to conduct the business of banking and credits a depositor of the former bank with the amount of his deposits on its books of account, it assumes toward the depositor the same relation that its assignor bore. The creditor is a depositor of the second bank and his claim cannot be barred by the Statute of Limitations.<sup>1</sup>

§ 367. **When depositor is a lunatic.** V., the plaintiff, at the request of B., deposited money belonging to him with a bank, depositing the same, however, in V.'s name. He afterward gave B. two checks for the amount which in February, 1869, he transferred to E., in consideration for her promise to marry him. Lunacy proceedings were begun against B. the next day, pending which the bank was enjoined from paying any one. In March B. was declared a lunatic, and a committee were appointed to whom the bank could and did legally pay the deposit. In 1870, however, V. brought an action against the bank to recover the amount of the deposit, but the court held that it was barred by the statute. The running of the statute against him was not affected by the fact that within six years the bank had paid checks drawn by him for a balance due on his own account.<sup>2</sup>

<sup>1</sup> Green v. Odd Fellows' Sav. & Com. Bank, 65 Cal. 71.

<sup>2</sup> Viets v. Union Nat. Bank, 101 N. Y. 563. The plaintiff's right to recover did not rest on the ground that he was the owner of the money deposited in the bank or had any absolute title to the same. It clearly did not belong to him, and if this action could be maintained it must be for the reason that the deposit in his name with the consent of B., and the making and delivery of the checks under the circumstances stated conferred on him the right to enforce payment against the bank. Opinion of the court, Id. p. 568. April 1st, 1865, B. drew a check on a bank and delivered it to S., who on the same day indorsed and transferred the check to R. It remained in the latter's possession until April, 1875, having been mislaid, when it was presented to the bank and payment was refused. In an action thereon it was held to be barred by the Statute of Limitations. Whether or not the drawer had funds on deposit in the bank at the time the check was drawn, or within six years thereafter, was immaterial. Brust v. Barrett, 16 Hun, 409.

## CHAPTER XVII.

## OVERDRAFTS.

§ 368. **Account should not be overdrawn.** (a) *Opinion of Woodward, J.* A bank cannot justify itself in paying an overdue check when the drawer has no funds there, on the ground that he is a customer in good credit and had given no notice to the institution that the check had been paid.<sup>1</sup> Yet a bank in Pennsylvania paid such a check and attempted to prove afterward, in a suit to recover the amount of the maker, that it was "a custom to pay overdrafts of solvent dealers with banks." The bank failed to prove it, but, "if it had not failed," said Judge Woodward, "such a custom should be abolished. Our banking institutions are generally conducted by boards of directors, to whom stockholders look for the proper use and management of the capital invested; whilst the ordinary routine of daily business is entrusted to cashiers and clerks who are not directors, generally not stockholders, and who have no power to discount paper. If these subordinate officers might pay checks, which are properly drafts on funds deposited, where there were no funds of the drawer on deposit, the capital of banks would be liable to perversion to purposes, and in modes, that were never contemplated, either by the Legislature or the stockholders. That the practice of paying overdrafts has prevailed to some extent is quite likely; and it may be true that boards of directors have in some instances sanctioned it; but it has no authority in sound usage or in law."<sup>2</sup>

<sup>1</sup> Officers of a bank should not permit a deposit to be overdrawn. *Minor v. Mechanics' Bank*, 1 Peters, 46, p. 72. Payment of overdrafts without a special excuse is a violation of duty, *Bank v. Calder*, 3 Strob. 403.

<sup>2</sup> *Lancaster Bank v. Woodward*, 18 Pa. 357, p. 362.

(b) *Maryland view.* Judge Dorsey, of Maryland, also said that the customers of the banks in that State had "no accommodation credit, and without a gross violation of their trust they can honor no check or draft upon them beyond the amount of deposits standing to the credit of him by whom such check or draft may be drawn."<sup>1</sup>

§ 369. **Agent has no authority to overdraw.** Authority to an agent to collect debts and to draw money does not authorize an agent to overdraw, and if he should do so, a bank would not be protected against his principal.<sup>2</sup> And if overdrafts are made by an agent through fraudulent collusion with a book-keeper in a bank without the knowledge or sanction of the principal, and who receives no part of the proceeds, it must bear the loss. Of course, the bank can look to the book-keeper and his sureties, and to all who participated in the fraud.<sup>3</sup> In a case of this kind the loss was "occasioned by the fraud of an agent clerk and servant of the bank; by the fraud of a clerk in regard to his legitimate business in his appropriate department in the bank, and therefore obligatory on the bank so far as respects innocent third persons. In judgment of law, therefore, the act of the clerk in this respect was the act of the bank."<sup>4</sup>

§ 370. **Overdrawing at insolvent bank.** (a) *In re Bank of Madison.*<sup>5</sup> If a bank receive a note for collection from a depositor which is discounted, and the proceeds are credited to him, it becomes the property of the bank, and passes to the receiver after its insolvency. If, at the time of receiving a note from a depositor for discount his account is overdrawn, but is made good before the bank becomes insolvent, this does not constitute the bank a trustee for the proceeds of the note. Another depositor prayed the court to order the receiver to refund the amount of a draft drawn on the Second National Bank of Chicago, and which the failed bank re-

<sup>1</sup> *Eichelberger v. Finley*, 7 Harr. & Johns. 381, p. 387.

<sup>2</sup> *Union Bank v. Mott*, 39 Barb. 180.

<sup>3</sup> *Id.*

<sup>4</sup> *Peckham, J., Id.* p. 182. See *Washington Bank v. Lewis*, 22 Pick. 24.

<sup>5</sup> 5 Biss. 515.

ceived for collection. The Second National Bank collected the draft, but kept the money as it was a creditor of the other. Neither the failed bank nor the receiver therefore had the money to pay to the person who left the draft for collection. The court said that the officers of the bank must have known such would be the result when they received it to collect, and their conduct was deserving of the severest censure.<sup>1</sup>

(b) *Van Dyck v. McQuade*.<sup>2</sup> At the time of the failure of a savings bank a depositor was indebted to it for an overdraft of more than \$5000. The receiver having sued him, he defended on the ground that the institution had on deposit to the credit of two parties more than that sum, which by an agreement with the bank a year before, was transferable to his credit. About the time of the failure, he also sought to have these deposits applied to his indebtedness. But the court said that he had no such right. The alleged agreement imposed no obligation whatever on the bank to apply them, but merely gave it an option to resort to those deposits for the purpose of making good any overdrafts of the defendant. On the approaching failure of the bank it was the clear duty of its officers to abstain from exercising that option.

§ 371. **Bank can recover amount of overdraft.** If an overdrawn check be paid by a cashier the bank may maintain an action thereon against the drawer. "If the cashier without authority," said Judge Appleton in *Franklin Bank v. Byram*,<sup>3</sup> "misappropriates the funds of the bank, if he violates his trust, if he pay away money wrongfully and that money can be traced into the hands of one conusant of his breach of trust and participant in his wrong-doings it is difficult to perceive why redress should be denied the bank. In this view it is immaterial whether it is paid out on a check or not. If the drawer of the check has no funds the cashier is under no greater obligation to pay than if it were a mere verbal re-

<sup>1</sup> 5 Biss. p. 521.

<sup>2</sup> 85 N. Y. 616. See § 391.

<sup>3</sup> 39 Me. 489.

quest. The overdrawing and the payment of the check overdrawn are both wrongful acts. If in such case the money of a bank has been misappropriated by its cashier, without the knowledge or consent of its officers, there is neither law nor equity in permitting the recipient to retain what he has received without right. The bank may consequently recover the amount shown to have been overdrawn."

§ 372. **Reclaiming money fraudulently overdrawn.** If a person by fraudulent overdrawing obtain the money of another and deposits it to his own credit elsewhere the title to the money is not changed and can be reclaimed.<sup>1</sup>

§ 373. **Redemption of stock pledged for overdraft.** A debtor to a bank for an overdraft transferred stock at a fair price in payment of the debt, "subject to his right of redemption in two years," and was paid the difference between the stock and his debt. It was decided that after the expiration of the two years the stock could not be redeemed.<sup>2</sup>

<sup>1</sup> *Tradesman's Bank v. Merritt*, 1 Paige, 302. If a depositor fraudulently overdraws his account the bank may recover the money of one who has received it with knowledge of the fraud and without having given a valuable consideration therefor, *Mechanics' Bank v. Levy*, 3 Paige, 606.

<sup>2</sup> *Lauman's Appeal*, 68 Pa. 88.

## CHAPTER XVIII.

WHEN CAN A DEPOSIT BE RETAINED TO PAY THE DEPOSITOR'S  
INDEBTEDNESS.

WHEN has a bank the right to apply the funds of a depositor to the payment of a debt due by him to itself?

§ 374. **Bank has a lien for depositor's indebtedness.** The principal rule is when a depositor is indebted to a bank by bill, note or other matured indebtedness, it has the right to apply his deposit to the payment of the obligation.<sup>1</sup> "It is given by the law upon the presumption that it is upon the faith of moneys and securities coming into the possession of the banker, in the course of general dealings, not especially devoted to other uses a balance is suffered to accumulate against the customer."<sup>2</sup> The term lien is often used to express this right of the depository to retain the funds of a depositor.

§ 375. **Set-off.** (a) *This is a statutory right.* A demand by a depositor or depository can also be lessened or extinguished by setting off a debt due from the demander. This right of set-off is given by statute and does not exist at common law,<sup>3</sup> though it does to some extent in equity.<sup>4</sup> The object of such

<sup>1</sup> *Commercial Bank v. Hughes*, 17 Wend. 94; *Union Bank v. Tutt*, 5 Mo. App. 342; *Brandao v. Barnett*, 12 Clark & Fin. 787; Rev. 6 Man. & Gr. 630, which reversed 1 Man. & Gr. 908; *London Chartered Bank v. White*, L. R., 4 App. Cas. 413. A bank or banker has a lien on all moneys and securities of a depositor coming into his possession in the regular course of business for any balance due him on general account, *Lehman Brothers v. Tallassee Manuf. Co.*, 64 Ala. 567.

<sup>2</sup> *Brickell, C. J., In re Tallassee & Co.*, 64 Id. p. 595.

<sup>3</sup> "The defence known as set-off is not a common law defence, but is wholly the creature of statute and is regulated by statute," Lord, J., in *Barnstable Sav. Bank v. Snow*, 128 Mass. p. 513.

<sup>4</sup> *Story's Equity*, ch. 38.



statutes, which exist everywhere, is to enable parties having demands against each other to settle them with the least possible litigation. This can be lessened by permitting parties to determine their several claims in the same action instead of separate ones. Set-off in many regards is in the nature of a cross action.

(b) *Their application.* The statutes are those which have a general application, and those which apply to insolvent or bankruptcy proceedings. To understand the law relating to the application of one debt to the payment of another these distinctions must be kept in mind.

### *Lien.*

§ 376. **Lien not recognized everywhere.** Having shown the distinction between a lien and set-off, we may remark that the former is not recognized everywhere. It is not in Pennsylvania,<sup>1</sup> and in Illinois "a banker's lien cannot extend to the money left on deposit with him according to the customs and usages of banks. It has never been so extended, but is confined to securities and valuables which may be in the banker's custody as collaterals. The credit must be given on the credit of the securities or valuables, either in possession or expectancy."<sup>2</sup> This is the extent of a banker's lien."<sup>3</sup> But a bank has the right of set-off against a depositor's balance remaining after all the checks drawn against the same have been presented and paid.<sup>4</sup>

§ 377. **General lien not favored.** "General liens," says Judge Van Vorst, "for a balance of account are not favored. If there be a usage giving to persons engaged in discounting, buying, advancing on, or selling, bills or notes, a lien for a general balance against their customer, such usage should be proved. It will not be presumed to exist in the absence of

<sup>1</sup> Appeal of Liggett Spring and Axle Co., 111 Pa. 291.

<sup>2</sup> Russell v. Haddock, 3 Gilm. (Ill.) 233.

<sup>3</sup> Fourth Nat. Bank v. City Nat. Bank, 68 Ill. 398, p. 402.

<sup>4</sup> Id.

an express agreement. Courts have judicially taken notice of the lien of bankers, who are strictly such, and who are dealers in money. But even the lien of a banker does not exist if there be circumstances in any case inconsistent therewith."<sup>1</sup>

§ 378. **Existence is question of fact.** "Whether a banker has a lien for any general balance due him depends upon the circumstances of the particular case. The law will not force a lien on a banker any more than upon any one else, against the actual or presumed intention of the parties. If there is a lien it is because there is, at all events, nothing in the transaction which expels the presumption of giving a credit on the strength of the securities."<sup>2</sup>

§ 379. **Application of lien and set-off.** (a) The case of the *State Bank v. Armstrong*<sup>3</sup> is one of the most instructive in applying the law of banker's lien and set-off. The bank owed Armstrong's estate \$930 on general account; on the other hand, the bank had obtained judgment against him in his lifetime for a much larger sum, while he had also retained another sum paid over to him for deposit in the bank, but which he had neglected to do. Judge Gaston, who delivered the opinion of the court, after remarking that the deposits made by Armstrong were general, consisting either of money, notes of the bank, or of other banks, bank-checks and proceeds of discounts, said: "They were incorporated into the mass of the funds of the plaintiffs, became their property, and entitled Armstrong to a general credit for the amount thereof in account. Upon a settlement the plaintiffs were bound honestly to account with him for that amount, and faithfully to pay over any balance, which on such settlement should be

<sup>1</sup> *Grant v. Taylor*, 35 N. Y. Sup. Ct., p. 351, citing *Brandao v. Barnett*, 6 Man. & Gr. 630.

<sup>2</sup> "It has been long settled that wherever a banker has advanced money to another, he has a lien on all the paper securities which are in his hands for the amount of his general balance, unless such securities were delivered to him under a particular agreement," Taney, C. J., *Bank of the Metropolis v. New England Bank*, 1 How. 234; *Grant v. Taylor*, *supra*.

<sup>3</sup> 4 Dev. 519.

found rightfully due. They were undoubtedly entitled to charge him with whatever sums they had paid to him, or to his checks to others, and with such other disbursements and demands, as by the agreement of the parties, or by the nature of their dealings, or by the known usages of the institution, or by the law of the land, were proper debits in such a running account. Had the plaintiffs the right as against Armstrong upon his refusal to pay over to them moneys which he had received to their use, to charge this in the account to the extent of his funds in bank? There can be no question but if the bank had paid off a note or acceptance of his, payable at the bank, this would have constituted a proper debit in the account. It is not to be doubted also but that they had a right to apply his funds in their hands to the payment of any note or acceptance of his held by them.<sup>1</sup> Upon the examination of the account referred to we find that the very first debit is [a note, and] that according to the course of dealing between the parties he is charged in account with other money demands. . . From the nature of this account, as an open running account of the cash transactions of the parties, embracing a variety of receipts and payments, debits and credits, from the manner of their dealing with each other, and upon common law principles . . . we think that either has a right to retain for, or to charge in account against the other, money received by the latter for the use of the former, so that the balance thus ascertained shall be the true debt."<sup>2</sup> Furthermore, the court continued: "If the claim of the plaintiffs against the administrator were so connected with this balance appearing due on open account that both were items in one continued dealing, then the refusal to pay was rightful, because in truth there was nothing due. If, however, these mutual claims were unconnected, the plaintiffs had a right to refuse payment, because they had a proper set-off. A debtor who makes an actual payment with his own money has a right to

<sup>1</sup> Rogerson v. Ladbroke, 1 Bing. 93.

<sup>2</sup> Dale v. Sollet, 4 Bur. 2133; Green v. Farmer, Id. 2214, p. 2221.

direct its application because it is his money, and he alone has the legal control over it. But a creditor has no right to direct his debtor to apply the sum due him to any one of two cross demands which that debtor may have against the creditor. The money in the hands of the debtor is yet his money, he has the legal control of it; its specific application cannot be ordered by the creditor, and the right of opposing a set-off, and if so, of selecting the set-off which he will thus oppose, is the right of the debtor." In other language, if the claims of the bank against Armstrong were a part of a general transaction, there was no balance due to him or his estate on general account; if they were not a part of a general transaction, but disconnected, the bank had the same right as an ordinary debtor to set off either one of its claims against this balance.

(b) *Falkland v. St. Nicholas Bank*<sup>1</sup> is a noteworthy case. Ruger Brothers, a firm of ship brokers, becoming embarrassed on July 13, 1886, opened a new account with the St. Nicholas Bank in the name of their book-keeper, Falkland, who managed the account in accordance with instructions received from the firm. Prior to July 23, the bank received and discounted in the regular course of business, a note made by Ruger Brothers, which became due at that time. On the 16th of August the bank charged the amount due on the note to Falkland's account. After his death his administrator sought to recover the full amount of the deposit, but the court said that "it must be made clear that the moneys deposited actually belong to the person from whom the account is due to entitle the bank to apply them in payment of its demand. Conceding that the moneys are applicable, even although they are deposited by and in the name of another, the same as if in the name of the actual owner, the fact of ownership must be made to appear, and it must be shown satisfactorily that such owner is the person indebted to the bank and really entitled to the funds deposited. . . The moneys

<sup>1</sup> 84 N. Y. 145, p. 150.

in question were not actually the property of Ruger Brothers, and they had no right or title to the same, and the defendant's demand was not the subject of set-off or recoupment against such moneys."

§ 380. **Bankrupt depositor.** Whenever a depositor becomes bankrupt his deposit is a security for and payment *pro tanto* of his liabilities to the bank by the operation of the principle of mutual credit. And if a bank has a contingent or unliquidated claim against him, his deposit may be retained until the amount of the claim is ascertained, when the deposit may be applied in payment as far as necessary.<sup>1</sup> In such cases the principal question is one of fact, does a lien really exist?

(a) *In ex parte Hornby*,<sup>2</sup> a customer failed owing his banker on bills of exchange that had been discounted for him. The banker proved his claim for the whole balance due, and afterward when some of the bills were paid by those who were liable thereon, before and after the dividend had been declared, the banker's balance was reduced by the amount thus paid, and the dividends on the excess were refunded. In *Kelly & Co. v. Phelan*,<sup>3</sup> which was a suit against the assignee of a bankrupt bank to recover money arising from the sale of securities belonging to Kelly & Co., the lien was established.

§ 381. **Depositor's check discharges lien.** If a depositor is indebted to the bank and draws a check thereon to pay his debt, the amount is applied from the time of presenting the check, nor can the bank refuse to accept it in payment of his indebtedness.<sup>4</sup>

§ 382. **What general lien does not cover.** What funds can be applied by a bank to discharge the indebtedness of its depositor is an important question. The general rule is, when securities are specifically pledged to a bank to secure the payment of a particular loan or debt it has no lien on

<sup>1</sup> *Ex parte* Howard Nat. Bank, 2 Low. 487.

<sup>2</sup> De Gex. 69.

<sup>3</sup> 5 Dill. 228.

<sup>4</sup> *Laubach v. Leibert*, 87 Pa. 55.

them for a general balance, or for the payment of any other claim.<sup>1</sup>

(a) *In the case of the Neponset Bank v. Leland*,<sup>2</sup> the institution sought to enforce the collection of some notes which had been made by the defendant on the ground that "a banker has a lien on all the paper securities which come into his hands for a general balance." Judge Dewey said that the general principle subject to proper limitations might be well sustained by authorities. "As in *Bolland v. Bygrave*,<sup>3</sup> which was a case of bills delivered by a party to be discounted in the ordinary course of business, and where it was held, in the opinion given by Abbott, C. J., that a banker has a lien upon any securities of the customer which may for any purpose be placed in his hands. Lord Kenyon, in *Davis v. Bowsher*,<sup>4</sup> states the principle thus: 'I am clearly of opinion that by the general law of the land a banker has a general lien upon all the securities in his hands belonging to any particular person for his general balance, unless there be evidence to show that he received any particular security under special circumstances which would take it out of the common rule.'" The bank failed to recover because the securities were deposited for a special purpose.

(b) *Note left for discount and refused.* A bank, therefore, has no right to retain a note left for discount, but which has been refused, to discharge an indebtedness due from the depositor. In *Petrie v. Myers*<sup>5</sup> Judge Barrett said that the bank in that case "had no right, upon declining a discount, to retain the note, and its action was clearly tortious. The paper was not left for collection, nor for the performance of

<sup>1</sup> *Wyckoff v. Anthony*, 90 N. Y. 442; *Vanderzee v. Willis*, 3 Bro. Ch. Cas. 20; *Davis v. Bowsher*, 5 Term, 488; *Lane v. Bailey*, 47 Barb. 395; *Duncan v. Brennan*, 83 N. Y. 487; see also *Wilmerding v. Hart, Hill & Denio*, Supp. 305; *Robinson v. Frost*, 14 Barb. 536.

<sup>2</sup> 5 Met. 259; *Re Bowes, Earl of Strathmore v. Vane*, 55 Law T. Rep. N. S. 260.

<sup>3</sup> Ry. & M. 271.

<sup>4</sup> 5 Term, p. 491.

<sup>5</sup> 54 How. Pr. 513.

any banking duty, nor even for safe custody. It is contended that the banker's lien extends to all securities which may happen to be in its hands for any purpose, and *Barnett v. Brandao*<sup>1</sup> is cited in support of that proposition. The case holds directly the opposite." Lord Denman, in delivering judgment in that case, said:<sup>2</sup> "The right of bankers does not extend to all securities which may happen to be in their hands for any purpose, but to such only as come to their possession as bankers, in the way of their business; upon those they have a general lien, 'unless there be,' in the language of Lord Kenyon, 'evidence to show that the banker received any particular security under special circumstances which would take it out of the common rule.' A lease, therefore, which was accidentally left with a banker after he had refused to advance money upon it, has been held not to be subject to any lien.<sup>3</sup> If it be a security for money within the meaning of the rule, it is not in the banker's possession in the way of his business; and instances may be put of a special agreement to deal with the securities in a manner inconsistent with the claim of lien which would bring them within the exception stated by Lord Kenyon." In the above case, Burns bought for Brandao, a Brazilian, and with his money, exchequer bills which were kept with his banker, Barnett, Burns retaining the key to the box containing them. As often as the time came for exchanging the bills for new ones Burns took them out of the box and gave them to his banker, which was the usual course of business. The new bills were given to Burns and locked up by him in his box, and the interest on them was passed to his credit in the account with his bankers. The bankers never knew that they belonged to Brandao. On one occasion Burns delivered the bills to his bankers to be exchanged. Burns having failed while the bills were in possession of his bankers, and owing them an account, they endeavored to hold the bills for the balance due. Brandao, claiming the owner-

<sup>1</sup> 6 Man. & Gr. 630.

<sup>2</sup> Id. p. 666.

<sup>3</sup> *Lucas v. Dorrien*, 7 Taunt. 278; S. C., 1 Moore, 29.

ship of the bills, sought to recover them. The Court of Common Pleas decided in his favor, but their decision was reversed by the Court of Exchequer Chamber for two reasons. "The Court of Common Pleas appear to have decided this case on the ground that . . it was not competent for the banker and customer to agree expressly, or in any other manner, that the banker should have a lien on the property of other persons, on which the customer had no authority to give one." While this position was declared to be true with respect to goods, it was declared not to be "with respect to negotiable securities, the title to which is transferred by delivery to a *bona fide* holder for value. These securities are to be deemed, with respect to such holders and to the extent of the rights acquired by them by the transfer, as the property of the person transferring, whether the transfer be express or implied; and the *bona fide* holder acquires a title which did not belong to the person who gave it to him. The same rule which prevails as to bills or notes payable to bearer, placed in the hands of a banker to be received, would apply to exchequer bills transferrable to bearer; in both, if the banker is a creditor on a general balance, and *bona fide* receives them as the property of the customer, he is entitled to a lien." For that reason, therefore, the judgment could not stand. The other reason was that the bills were received by the bankers in the course of business. It is true that the "bills were delivered for a special purpose, but that purpose was the performance of a duty as bankers; for which indeed, they would have been entitled to commission, if the course of business with London bankers admitted of such a mode of remuneration. . . If, indeed, there had been an agreement, express or implied, inconsistent with a right of lien, as, to return them absolutely at all events to the depositor, at a certain time, the case would have been different." Nevertheless, the House of Lords<sup>1</sup> reversed the last decision, and sustained that of the Court of Common Pleas on the ground that there was an

<sup>1</sup> 12 Clark & Fin. 787, pp. 807, 809.



implied agreement on the part of Brandao inconsistent with the right of lien which he claimed. In thus reversing the action of the Court of Exchequer Chamber, Lord Campbell remarked that the "judgment will leave untouched the rule that bankers have a general lien on securities deposited with them as bankers, but will prevent them from successfully claiming a lien on securities delivered to them for a special purpose inconsistent with the existence of the lien claimed."

(c) *Nor the surplus of pledged property.* In another case a partnership had an account with a banking house, and A., the senior partner, had also a private account there. The two accounts were kept separately. To get an extension of partnership credit in the form of an overdraft, A., in the partnership name, deposited the lease of his house as security. Some time later the partnership account was closed, the lease of the house was sold and the proceeds were handed to the bankers. A. also was adjudicated a bankrupt, and his trustees in bankruptcy brought an action against the banking house to recover the surplus of the proceeds of the sale of the house after deducting the overdraft above mentioned. The bankers sought to hold the surplus on both the partnership and A.'s private account, but the court declared that the lease was deposited merely for the purpose of securing the repayment of the overdraft, and that they did not have a general lien on the proceeds of the sale, and consequently that the surplus must be refunded.<sup>1</sup> Nor can a savings bank apply the surplus from the sale of stock held as collateral security, for the payment of a note on the general balance due from the maker.<sup>2</sup>

(d) *Nor an assignee's deposit for personal debt.* A bank cannot retain a deposit made by a person as an assignee to extinguish a debt due from him individually.<sup>3</sup> But a bank may apply money deposited on private account, though in truth

<sup>1</sup> *Wolstenholm v. Sheffield Union Banking Co.*, 54 Law T. Rep., N. S., 746.

<sup>2</sup> *Brown v. New Bedford Institution*, 137 Mass. 262.

<sup>3</sup> *Lawrence v. Bank of the Republic*, 35 N. Y. 320.

it is trust money, if having no knowledge of its nature, to liquidate a balance due from the depositor.<sup>1</sup>

§ 383. **What general lien does cover.** A bank has a lien on a title-deed indorsed "lodged to cover overdraft," and signed by the depositor as against the depositor's assignee, not only for overdue bill, but for money drawn out by checks.<sup>2</sup> Also on a negotiable note deposited by an attorney for collection without stating for whose account. A bank which received one in this way credited his account with the amount and applied the same in part payment of a debt he owed the institution. The attorney failed and the bank in settling with the assignee included the note. A year afterward, the owner of it, learning that it had been collected, demanded the proceeds of the bank and brought a suit to recover them, but failed.<sup>3</sup>

§ 384. **Notes sent for collection from another bank.** (a) *Federal rule.* The lien of a bank for a balance due from another bank will cover notes, bonds or other securities sent to it for collection, which, on their face, belong to the sender. This principle was established in the case of the Bank of the Metropolis v. The New England Bank.<sup>4</sup> The former, which was located at Washington, and the Commonwealth Bank of Boston for a long time had made collections in their respective cities for each other. The Boston bank became insolvent. When this event happened the New England Bank sued the Washington bank to recover the amount of notes belonging to the former which had been sent through the Commonwealth Bank for collection. The Bank of the Metropolis did not know at the time of receiving the notes that they belonged to the New England Bank; indeed, in every instance the notes and other securities sent belonged to

<sup>1</sup> School District v. First Nat. Bank, 102 Mass. 174.

<sup>2</sup> *In re Joseph Williams*, 1 R. 3 Eq. 546.

<sup>3</sup> Wood v. Boylston Nat. Bank, 129 Mass. 358.

<sup>4</sup> 1 How. 234; S. C., 17 Peters, 174, second trial, 6 How. 212; see also Wilson v. Smith, 3 Id. 763; Rathbone v. Sanders, 9 Ind. 217; Gordon v. Kearney, 17 Ohio, 572; Cornwell v. Kinney, 1 Handy, 496.

the sending bank so far as the receivers knew or had means of knowing. The Bank of the Metropolis claimed the right to apply the amount of the notes on the large balance due from the Commonwealth Bank. "The paper in question," remarked Chief Justice Taney, who delivered the opinion of the court, "was the property of the New England Bank, and was indorsed and delivered to the Commonwealth Bank for collection, without any consideration, and as its agent in the ordinary course of business; it being usual, and indeed necessary, so to indorse it, in order to enable the agent to receive the money. Yet the possession of the paper was *prima facie* evidence that it was the property of the last-mentioned bank; and without notice to the contrary the [Bank of the Metropolis] had a right so to treat it, and was under no obligation to inquire whether it was held as agent or as owner; and if an advance of money had been made upon this paper to the Commonwealth Bank, the right to retain for that amount would hardly be disputed. We do not perceive any difference in principle between an advance of money and a balance suffered to remain upon the faith of these mutual dealings. In the one case as well as the other, credit is given upon the paper deposited or expected to be transmitted in the usual course of the transactions between the parties."<sup>1</sup>

<sup>1</sup> Where a draft was remitted by a collecting agent to a sub-agent for collection and the proceeds were applied by the sub-agent in payment of the indebtedness of the agent to himself, in ignorance of the rights of the principal, this court held that there being no new advance made and no new credit given by the sub-agent, the principal was entitled to recover against him. *Wilson v. Smith*, 3 How. 763; *United States v. State Bank*, 96 U. S. p. 35.

The Supreme Court at the second trial directed that the following instructions should be given to the jury when the case should be tried the third time before them:—

1. "If, upon the whole evidence before them, the jury should find that the Bank of the Metropolis, at the time of the mutual dealings between them, had notice that the Commonwealth Bank had no interest in the bills and notes in question, and that it transmitted them for collection merely as agent, then the Bank of the Metropolis was not entitled to retain against the New Eng-

(b) *Followed in Maryland.* In Maryland the rule of the United States Supreme Court as laid down in *Wilson v. Smith*,<sup>1</sup> "that whenever by express agreement between the parties a sub-agent is to be employed by the agent to receive money for the principal, or where an authority to do so may fairly be implied from the usual course of trade or the nature of the transaction, the principal may treat the sub-agent as his agent and when he has received the money, may recover it," has been followed.<sup>2</sup>

(c) *But not in New York.* In New York, Pennsylvania, and other States a different rule prevails. In these a bank which receives notes from another for collection obtains no better title to them or their proceeds than the remitting bank had, unless it becomes a purchaser for value without notice of any defect of title. Nor does the collecting bank become the purchaser by having a balance against the remitting bank arising from their mutual dealings, which it has refrained from drawing.<sup>3</sup> "We cannot," said Judge Clark, "consent

land Bank for the general balance of the account with the Commonwealth Bank.

2. "And if the Bank of the Metropolis had not notice that the Commonwealth Bank was merely an agent, but regarded and treated it as the owner of the paper transmitted, yet the Bank of the Metropolis is not entitled to retain against the real owners unless credit was given to the Commonwealth Bank, or balances suffered to remain in its hands to be met by the negotiable paper transmitted or expected to be transmitted in the usual course of the dealings between the two banks.

3. "But if the jury found that, in the dealings mentioned in the testimony, the Bank of the Metropolis regarded and treated the Commonwealth Bank as the owners of the negotiable paper which it transmitted for collection, and had no notice to the contrary, and upon the credit of such remittance made or anticipated in the usual course of dealing between them, balances were from time to time suffered to remain in the hands of the Commonwealth Bank, to be met by the proceeds of such negotiable paper, then the [Bank of the Metropolis] is entitled to retain against [the New England Bank] for the balance of account due from the Commonwealth Bank."

<sup>1</sup> 3 How. 763.

<sup>2</sup> *Miller v. Farmers & Mechanics' Bank*, 30 Md. 392; *Cecil Bank v. Farmers' Bank*, 22 Id. 148.

<sup>3</sup> *McBride v. Farmers' Bank*, 26 N. Y. 450. In this case the remitting bank

to the doctrine that a mere usage and course of dealing between banks in the transmitting of bills and notes for collection by which they mutually credit the avails in account to overbalances due can, without more, deprive a third person, the real owner of the notes or bills, of his rights.”<sup>1</sup> He therefore can stop the payment of a draft sent for collection, if the bank to which it has been sent should become insolvent without subjecting himself to the liability of a drawer in a suit by the receiver.<sup>2</sup>

(d) *Missouri rule.* In Missouri a rule differing from the national or the New York one has been established. If two banks have “mutual and extensive dealings . . . on a mutual account current between them” then the national rule is applied and each bank has a lien on the notes sent by the other for collection; but, in the words of Judge Holmes, if “there is no such mutual arrangement or previous course of dealing between the parties whereby it is expressly or impliedly understood that such remittances of paper are to go to the credit of the previous account when received and no advance is made nor any credit given on the basis of the particular bill, or upon the faith of such course of dealing and

(which assigned the notes to the plaintiff), having demanded them before maturity and the proceeds afterwards, and both being foreign corporations, a new demand was held not to be necessary.

A negotiable promissory note indorsed by the payee as owner, and by him deposited in a bank for collection, and by that bank transferred in the usual course of exchange to another bank for the same purpose, does not create by lien or otherwise any title in the latter bank to the note or the avails as against the payee, though the former bank fails before the maturity of the note owing the latter a large balance, *Van Namee v. President of the Bank of Troy*, 5 How. Pr. 161; *Commercial Bank v. Marine Bank*, 3 Keyes, 337; *Coddington v. Bay*, 20 Johns. 637; *Rosa v. Brotherson*, 10 Wend. 85; *Stalker v. M'Donald*, 6 Hill, 93; *Youngs v. Lee*, 12 N. Y. 551; *Lindauer v. Fourth Nat. Bank*, 55 Barb. 75; *Dod v. Fourth Nat. Bank*, 59 Id. 265; *Stark v. United States Nat. Bank*, 41 Hun, 506; *Jones v. Milliken*, 41 Pa. 252; *Lawrence v. Stonington Bank*, 6 Conn. 521; *First Nat. Bank v. Gregg*, 79 Pa. 384.

<sup>1</sup> *Hackett v. Reynolds*, 44 Leg. Int. p. 91.

<sup>2</sup> *Atkinson v. Stafford*, 20 Week. Dig. 49, dec. but not rep., 34 Hun, 625; see *Bury v. Woods*, 17 Mo. App. 245.

such future remittances or where the special circumstances are inconsistent with the hypothesis of such mutual understanding, and the one bank merely passes the proceeds of paper remitted for collection to the credit of the other on a subsisting indebtedness which it happens at the time to have standing against the other, there is no such lien, and no right to retain and apply the money collected in that manner; but the real owner of the funds may maintain an action to recover the amount."<sup>1</sup> The learned judge cited *Wilson v. Smith*<sup>2</sup> to sustain his position, and it may be that he intended to follow the rule established in that case. But if he did his language is not clear. It distinguishes more sharply between those banks which have mutual dealings with each other and those which have not, and declares that a lien exists between the former kind, but not between [the other. Of course a lien may exist, be created or withheld by express agreement.

(e) *No lien exists if note be "for collection" only.* Returning to the rule prevailing in the federal courts, an important qualification must be added. If the negotiability of the paper sent to the collecting bank be restricted, for example, if the indorsement be, "for collection, pay to the order of A. B.," this is a notice that the indorser is entitled to the money. Thus, a bank in New York sent checks to a Newark bank for collection, which had the qualified indorsement: "For collection, pay to the order of O. L. Baldwin, cashier," who was cashier of the Newark bank. They were sent by him to a bank in Jersey City to be collected, and the proceeds were credited to it by virtue of an agreement existing between the two to thus credit collections made by them. The Newark bank having failed before remitting the amount to the New York bank, the latter sued the Jersey City bank to recover the amount of the checks which had thus been collected and credited to the Newark bank. Judge Wallace said:<sup>3</sup> "if the defendant had been justified in assuming that such paper was

<sup>1</sup> *Milliken v. Shapleigh*, 36 Mo. 596, p. 599.

<sup>2</sup> 3 How. 763.

<sup>3</sup> *Bank of the Metropolis v. First Nat. Bank*, 22 Blatchf. 58.

the property of the Newark bank, it would have been entitled to a lien upon it for a balance of account, no matter who was the real owner of the paper.<sup>1</sup> But the checks bore the indorsement of the plaintiff in a restricted form, signifying that the plaintiff had never parted with its title to them. In the terse statement of Gibson, C. J., 'a negotiable bill or note is a courier without luggage; . . . a memorandum to control it, though indorsed on it, would be incorporated with it and destroy it.'<sup>2</sup> The indorsement by the plaintiff, 'for collection,' was notice to all parties subsequently dealing with the checks that the plaintiff did not intend to transfer the title of the paper, or the ownership of the proceeds to another. As was held in *Cecil Bank v. Farmers' Bank of Maryland*,<sup>3</sup> the legal import and effect of such indorsement was to notify the defendant that the plaintiff was the owner of the checks, and that the Newark bank was merely its agent for collection. In *First National Bank v. Reno County Bank*,<sup>4</sup> paper was indorsed, 'pay to the order of Hetherington & Co., Atchison, account of First National Bank, Chicago,' and it was held to be such a restrictive indorsement as to charge subsequent holders with notice that the indorser had not transferred title to the paper or its proceeds. Under either form of indorsement the natural and reasonable implication to all persons dealing with the paper would seem to be that the owner has authorized the indorsee to collect it for the owner, and conferred upon him a qualified title for this purpose, and for no other.<sup>5</sup> The defendant could not acquire any better title to the checks or their proceeds than belonged to the Newark bank, except by a purchase for value, and without notice of any infirmity in the title of the latter. As the indorsement of the checks was notice of the limited title of the Newark

<sup>1</sup> *Bank of Metropolis v. New England Bank*, 1 How. 234.

<sup>2</sup> *Overton v. Tyler*, 3 Pa. p. 347.

<sup>3</sup> 22 Md. 148.

<sup>4</sup> 3 Fed. Rep. 257.

<sup>5</sup> Judge Wallace also cited the following authorities: *Sweeny v. Easter*, 1 Wall, 166; *White v. National Bank*, 102 U. S. 658; *Lee v. Chillicothe Bank*, 1 Bond, 387; *Blaine v. Bourne*, 11 R. I. 119; *Clafin v. Wilson*, 51 Iowa, 15.

bank, the defendant simply succeeded to the rights of that bank. . . . As against the plaintiff, the defendant had no right to retain the proceeds of the checks as security or payment for any balance due to it from the Mechanics' National Bank of Newark after a demand by the plaintiff."<sup>1</sup>

(f) *Blaine v. Bourne*.<sup>2</sup> In another case a bill of exchange was specially indorsed, "Pay J. C., or order on account of B.," to which J. C. added a general indorsement and sent it to his correspondents. The drawer paid it, but J. C. having failed owing them, they applied the money toward his indebtedness. In the end, however, they were obliged to pay B. So, too, a bank in Indiana which had received from another bank a check indorsed "for collection" was declared to have no title thereto, or right to the proceeds when collected; the collecting bank was merely the agent of the transmitter. Likewise, when a bank receiving such a check sent it to another for collection, the latter was declared to be only the agent for the transmitter, and had no right to apply the proceeds to the payment of an indebtedness due from that bank.<sup>3</sup>

(g) *When collecting bank has made advance on discounted note.* If the drawer of a bill learns that the discounting bank has transferred it for collection to a business correspondent who has acquired a lien thereon by advancing money on the same before maturity, he ought not to pay the bill to the discounting bank. And if he does, the payment is wrongfully made and wrongfully accepted, and does not discharge the drawee from liability to the banker or person holding the lien unless the act is ratified. If the payment be made in iron or other commodity the discounting bank would hold it in trust for its correspondent if the latter should decide to ratify the payment.<sup>4</sup> But the correspondent must either ratify or disaffirm the payment as an entirety. He cannot while suing the drawer maintain an action against the bank to which

<sup>1</sup> *Central Railroad v. First Nat. Bank*, 73 Ga. 383.

<sup>2</sup> 11 R. I. 119.

<sup>3</sup> *First Nat. Bank v. First Nat. Bank*, 76 Ind. 561.

<sup>4</sup> *Williams v. Jones*, 77 Ala. 294.



the money was paid, or fasten a trust on the property received by it in payment.<sup>1</sup>

§ 385. **Partnership lien.** A banker has a lien on a deposit to discharge a debt due from the depositor to himself and his former partner.<sup>2</sup> But the bank has no lien on the deposit of a partner, for a balance due from the partnership.<sup>3</sup>

(a) *Lien of new partnership for note of old firm.* If a partner in a banking firm withdraw before a note owing to them matures, the new firm cannot apply deposits made with them by the makers to its payment unless they directed that this should be done. The money thus deposited belongs to the new firm if nothing be said concerning it.<sup>4</sup>

§ 386. **Assignor's deposit cannot be applied by bank after assignment.** A bank cannot apply the funds of a deposit to pay a balance due, or a note after he has made a general assignment for the benefit of his creditor. Consequently a bank in New York, which charged the amount of a draft that matured on the 27th of August to the account of a depositor, for whom it had been discounted, three days before he made an assignment of his property, was obliged to pay the amount to the assignee though having no notice of the assignment at the time of making the charge.<sup>5</sup> But a bank which holds a depositor's demand note has a lien on the proceeds of drafts delivered to it for collection after the giving of the note, though they are not collected until after the filing of his petition in bankruptcy.<sup>6</sup> Nor can a bank hold the proceeds of drafts collected after the depositor's assignment to reimburse his indebtedness to itself.<sup>7</sup>

<sup>1</sup> *Williams v. Jones*, 77 Ala. 294. If, however, the property was merely received as collateral security for the debt he might pursue it in equity and at the same time maintain an action at law against the debtor.

<sup>2</sup> *Snead v. Williams*, 9 Law T. Rep., N. S., 115.

<sup>3</sup> *Watts v. Christie*, 11 Beav., 546; *School District v. First Nat. Bank*, 102 Mass. 174.

<sup>4</sup> *Dawson v. Wilson*, 55 Ind. 216.

<sup>5</sup> *Beckwith v. Union Bank*, 9 N. Y. 211. See § 404.

<sup>6</sup> *In re Farnsworth, Brown & Co.*, 5 Biss. 223, see *Hough v. First Nat. Bank*, 4 Id. 349.

<sup>7</sup> *Hakman v. Schaaf*, Hamilton Co. Dis. Ct., Ohio, 5 Bull. 851. See § 63, b.

*Set-off.*

§ 387. **Depositor may apply his deposit on any account.** Turning now to cases involving the principles of set-off, a depositor may apply his deposit on whatever account he may have at a bank. "The general rule is," said Bayley, J., "that the party who pays money has a right to apply that payment as he thinks fit. If there are several debts due from him, he has a right to say to which of those debts the payment shall be applied. If he does not make a specific application at the time of payment, then the right of application generally devolves on the party who receives the money."<sup>1</sup> "But it is equally certain that a particular mode of dealing, and more especially any stipulation between the parties may entirely vary the case,"<sup>2</sup> for example, the giving of a bond to a bank to secure future payment, and which is intended as a continuing security.

§ 388. **Debts must be between same parties and in same right.** (a) *Pennsylvania cases.* Debts cannot be set off unless they are between the same parties and in the same right. In the following case is a recent application of this principle: A debtor bank on a note gave the holder a check on another bank. The bank on which the check was drawn having failed before its payment, the holder sued the debtor bank thereon. It claimed that a sum which was due from the holder to the failed bank ought to be set off against the note, but the court thought otherwise. "It is difficult to see," said Mercur, Ch. J., "on what principle the application of this sum can thus be enforced. The general rule is that a set-off is not allowable unless the debts be due between the same parties and in the same right."<sup>3</sup>

<sup>1</sup> *Simson v. Ingham*, 2 Barn. & Cr. p. 72.

<sup>2</sup> *Denman, C. J., in Henniker v. Wigg*, 4 Ad. & E., N. S., p. 794.

<sup>3</sup> *Canonsburg Iron Co. v. Union Nat. Bank, and Union Nat. Bank v. Canonsburg Iron Co.*, 34 Pitts. L. J. 93, 94 (1886); *Potter v. Burd*, 4 Watts, 15; *Milliken & Co. v. Gardner*, 37 Pa. 456; *Scott v. Fritz*, 51 Id. 418.

(b) *Winthrop Savings Bank v. Jackson*.<sup>1</sup> In another case a bank lent a person money, taking his note and a government bond as collateral security. After the note was payable, but before it was paid, the bond was stolen. The debtor sought to have his claim against the bank set off against the note. The court, however, held that even if the bank had been negligent and was responsible for the bond, no notice could be taken of the claim in that suit.

(c) *Tobey v. Manufacturers' National Bank*.<sup>2</sup> For the same reason, the lack of mutuality, if a deposit be transferred from an estate to the credit of the executors, the bank cannot afterward set off a debt due from the estate against the deposit.

(d) *In Pedder v. Preston*,<sup>3</sup> it appeared that the corporation of Preston kept an account at the plaintiff's banking house, and afterwards undertaking an additional function a second account was opened. Subsequently the banking house stopped payment, owing the corporation on one account and the creditors of it on the other. The question was, could the assignee of the banking house recover the amount due from the corporation, or could it offset the amount due to it from the banking house in extinguishing the debt? The court held that the set-off might be made, for though the accounts were separate, the defendants were creditors in the first account and debtors in the second in the same right.

(e) A person who had a private account at the defendant's bank opened another account there in the name of a mining company, and signed all checks drawn against the same in his official capacity as treasurer. He also notified the bank in the beginning that he was acting as treasurer of the com-

<sup>1</sup> 67 Me. 570.

<sup>2</sup> 9 R. I. 236. A.'s money was wrongfully paid by a bank to B., and A. sued the bank to recover it. B. on several occasions had paid money for A. The applying of B.'s payment, which was done by the jury, did not have the effect of ratifying the unauthorized act of B. in drawing A.'s money from the bank, *Heiderich v. Heiderich*, 18 Brad. 142.

<sup>3</sup> 9 Jurist, N. S. 496.

pany, and would not be individually responsible for its debts or other liabilities. In an action to recover the balance of his personal account the bank was not permitted to set off an overdraft against the company, although occasioned by crediting the depositor with a draft drawn by him as treasurer on members of the company.<sup>1</sup>

§ 389. **When a discount bank is insolvent.** (a) *Matured debts.* When a bank is insolvent, debtors will be permitted to set off its indebtedness to them while doing business against their own to the bank.<sup>2</sup> Likewise a depositor in a national bank which has failed may set off the amount of his deposit against his note held by the bank.<sup>3</sup> And in Tennessee a certificate of deposit of a savings bank, assigned by the holder to the debtor of a bank after its suspension, but before the filing of a bill for closing its affairs, will be set off in an action against the debtor.<sup>4</sup>

(b) *Debts maturing after insolvency.* Whenever an assignee seeks to recover the value of a note due after the assignment, the maker may set off a debt due to him by the assignor at the time the assignment was made.<sup>5</sup> But the maker cannot set off a claim subsequently assigned to him.<sup>6</sup> And whenever the action be against the indorser of a note which fell due after the bank's insolvency, he may set off a deposit standing to his credit.<sup>7</sup>

(c) *Set-off of indorser's deposit.* If a note owing to an insolvent bank has been discounted for the benefit of an indorser, his deposit may be set off against the same. Thus in the *Shackamaxon Bank v. Kinsler*,<sup>8</sup> the defendant was sued as maker

<sup>1</sup> *Miller v. Mickel*, 12 Pacific Rep. 240.

<sup>2</sup> *Clarke v. Hawkins*, 5 R. I. 219; *McLaren v. Pennington*, 1 Paige, 102; *Miller v. Receiver of Franklin Bank*, Id. 444; *Matter of Receiver of Middle Dist. Bank*, Id. 585; *Receivers v. Paterson Gas Light Co.*, 23 N. J. Law, 283.

<sup>3</sup> *Platt v. Bentley*, 11 Am. L. Reg. N. S. 171.

<sup>4</sup> *Moseby v. Williamson*, 5 Heisk. 278. See § 413.

<sup>5</sup> *Jordan v. Sharlock*, 84 Pa. 366; see *Stewart's Assignee v. National Security Bank*, 6 Week. No. Cas. 399.

<sup>6</sup> *Venango Nat. Bank v. Taylor*, 56 Pa. 14.

<sup>7</sup> *Arnold v. Niess*, 36 Leg. Int. 437.

<sup>8</sup> 16 Week. No. Cas. 509.

of a note, which in truth was discounted for the benefit of the indorser, the proceeds having been credited to him by the bank. The indorser had a sufficient deposit there to pay the note, which it was contended ought to be set off against the instrument. The court held that this should be done.

§ 390. **When a depositor is insolvent.** (a) *Notes offered for discount and refused.* A bank cannot set off notes left with it for discount and refused, in action brought afterward by the assignee of the depositor to recover a balance due before his insolvency. Said Chief Justice Shaw:<sup>1</sup> "In one of the latest cases on this subject<sup>2</sup> it was held that where the bank were creditors of the insolvent as holders of a discounted note, and debtors to the same insolvent as a depositor at the bank, these were mutual credits. But the distinction was there expressly taken between such a pecuniary credit, and the mere deposit of specific articles, without any lien or pledge, by contract, usage of trade, or otherwise. The case of *Rose v. Hart*<sup>3</sup> is there referred to, where this distinction is fully considered. It was there held that to constitute such a credit it must be property consigned, deposited, or intrusted to be converted into money so that the liability to account for it would ultimately become a debt." Nor can a bank set off unmatured paper of an insolvent depositor against the balance due him on his deposit.<sup>4</sup> In Ohio, though, a bank can set off against the deposit of a bankrupt his unmatured note that has been discounted for him, but not at the loss of *bona fide* holders of checks.<sup>5</sup>

(b) *Liability on notes as principal and indorser.* If the depositor fail and be indebted on notes as principal and indorser, his deposit should be set off against the aggregate amount of his notes on which he is the principal debtor, or indorser if

<sup>1</sup> *Stetson v. Exchange Bank*, 7 Gray, 425.

<sup>2</sup> *Demmon v. Boylston Bank*, 5 Cush. 194.

<sup>3</sup> 8 Taunt. 499.

<sup>4</sup> *Phil. Com. Pleas, Jones v. Manufacturers' Bank*, 10 Week. No. Cas. 102.

<sup>5</sup> *Skunk v. Merchant's Nat. Bank*, 19 Chic. Leg. N. 83.

the real principals are insolvent. But solvent principals, for whom the bankrupt is surety, must pay their own notes.<sup>1</sup>

§ 391. **When savings bank is insolvent.** An exception exists with respect to savings banks and mutual insurance companies. Whenever the depositor in an insolvent institution of this nature is also a debtor for money borrowed he is not entitled to set off the amount of his deposit against his indebtedness. The reason for this rule is that "the assets of the bank are its invested funds, the common contributions of all the depositors, in which they all have a common interest. All the profits of the business are divided among the depositors or accumulated in a surplus fund for their joint benefit and greater security. As each depositor is entitled to his proportionate share of the profits, so, in equity, each should bear his proportionate share of the losses. So long as the bank is solvent no injury can arise from permitting a depositor to offset his deposit against his debt due to the bank, as no preference would be given in such case to one depositor over another. But in case of insolvency to allow the set-off to be made would give an unjust preference to debtor depositors over all the others."<sup>2</sup>

<sup>1</sup> *Ex parte* Howard Nat. Bank, 2 Low. 487; see *Hebb's Case*, L. R., 4 Eq. 9; *Kip v. Bank*, 10 Johns. 63; *Pennell v. Deffell*, 4 De Gex, M. & G. 372.

<sup>2</sup> *Green, J., Hannon v. Williams*, 34 N. Jersey, Eq. 255; *Stockton v. Mechanics and Laborers' Sav. Bank*, 32 N. J. Eq., 163; *Osborn v. Byrne*, 43 Conn. 155; see also *Lawrence v. Nelson*, 21 N. Y. 158; *Hillier v. Allegheny Co. Mut. Ins. Co.*, 3 Pa. 470; *Matter of Receiver of New Amsterdam Sav. Bank v. Taritter*, 54 How. Pr. 385; S. C., 4 Abb. N. C. 215. In this case it was held that if a depositor was indebted to a savings bank on bond and mortgage he should be credited on his bond for the amount of his deposit in the event of the failure of the bank. This, however, is not the decision of the highest court, and is contrary to nearly all of the authorities.

In an action by a savings bank against two persons on a joint and several promissory note they cannot, under the statutes of Massachusetts, set off the amounts severally due them from the bank, *Barnstable Savings Bank v. Snow*, 128 Mass. 512.

If the directors of an insolvent bank make an assessment on unpaid stock subscriptions, for the purpose of meeting its liabilities, a stockholder cannot

§ 392. **Set-off against repayment of forged note.** Banks which collect checks for each other cannot set off against the proceeds of a note collected the amount of a check previously collected, but repaid because it was a forgery.<sup>1</sup>

§ 393. **Cannot set off debt against check holder.** A bank cannot set off a debt that it may have against the holder of a check when presenting it for payment.<sup>2</sup> "In the case of *Cromwell v. Lovett*<sup>3</sup> it was held that a check on a banker, given in the ordinary course of business, is not presumed to be received as an absolute payment, even if the drawer have funds in the bank, but as the means to procure the money. The holder, in such a case, becomes the agent of the drawer. . . . When it is remembered that almost all of the vast sums of money employed in carrying on the commerce of the world is paid out by means of checks which are not received as payment by the creditor or vendor, but simply as the means, and the usual means, of obtaining his money, it is but reasonable to regard the holder of the check as an agent of the drawer."<sup>4</sup>

§ 394. **Principles and practice in Hollister Bank case.** In August, 1857, the Hollister Bank of Buffalo discounted a draft, payable at sight drawn by Monteath on Grant and others of New York, and credited the drawer with that amount. Shortly afterward the bank failed and Monteath notified the drawers, and advised them not to accept the draft. It was therefore protested, and Monteath, in September, assigned to Howes and Suydam the amount credited to him by the bank on account of the draft. The Corn Exchange Bank then held the draft for a balance due from the Hollister Bank, the receiver of the latter bank having discharged this claim before beginning his action against Howes and

set off the amount of his deposit against the assessment; the capital stock is a trust fund for the benefit of all the creditors, *Macungie Sav. Bank v. Bastian*, Sup. Ct., 10 Week. No. Cas. 71.

<sup>1</sup> *Hall v. Tioga Nat. Bank*, N. Y. Sup. Ct., 21 Week. Dig. 416.

<sup>2</sup> *Brown v. Leckie*, 43 Ill. 497.

<sup>3</sup> 1 Hall, 56.

<sup>4</sup> Chief Justice Walker in *Brown v. Leckie*, *supra*.

Suydam. It was held that he could recover the amount which had been credited to Monteath by the bank on account of the draft. "This gave the bank," said the court, "the right to balance the credit by charging Monteath with the draft on his account. The defendants, as assignees of Monteath, had no greater rights than his assignor. Monteath, upon the discount of the draft by the bank, had a right at once to the proceeds, but not having drawn the money from the bank prior to the protest of the draft for non-payment, the bank could at once return the draft to him, and cancel the credit, or avail itself of the draft as a set-off against the demand of Monteath for the proceeds."

(a) *Hollister Bank case.* It was claimed by the defendants that the plaintiff was precluded from cancelling the credit given to Monteath for the proceeds of the draft in this way, because at the time of the assignment of this credit by Monteath to him the draft was in the possession of the Corn Exchange Bank, that bank having a lien upon it with other paper of the Hollister Bank, for whatever balance might be due from the latter to the former. "While the Corn Exchange Bank so held the draft, the Hollister Bank or the plaintiff could not charge the same to the debit account of Monteath, and thus cancel the credit given for the proceeds, or use it as a set-off in an action brought by Monteath for the money. To enable the Hollister Bank or the plaintiff to do either, the title to the draft must be absolute, and the holder able to discharge Monteath from all liability as drawer. This could not be done while the Corn Exchange Bank had a lien upon the draft for a general balance against the Hollister Bank. When the lien of the Corn Exchange Bank was satisfied by the plaintiff, he acquired the same title to the draft he would have had, had no such lien ever existed, with the same right to use it against Monteath. The defendants gave no notice of the transfer of the credit for the proceeds of the bill by Monteath to them, and upon well-settled principles, the claim of the defendants for that credit, whether they sought to enforce it by action or by way of set-off, was



subject to any defence that existed against Monteath at the time the bank or plaintiff had notice of the transfer.”<sup>1</sup>

§ 395. **When unmatured debt may be set off.** Equity will permit and enforce a set-off of a debt not yet due against a depositor's account. *Ford's Administrator v. Thornton*<sup>2</sup> is one of the best known cases on this point. A person named Gregory, who was indebted to a bank by a note payable in sixty days, died before its maturity, having a deposit in the bank larger than the amount of the note. His estate was insolvent. It was held that the bank had a right to deduct the whole amount of the note from the sum on deposit, even though there were claims against the estate of superior dignity to the debt due the bank.<sup>3</sup> President Tucker, in the above case, said: “According to my view of the case, no part of Gregory's deposit in bank constituted, upon his death, general assets of the estate, except the excess above what was sufficient to liquidate the note of Gregory due to the bank. The

<sup>1</sup> *Robinson v. Howes*, 6 Smith (N. Y.), 84. I. and A. agreed to speculate, and to put into the hands of F. one hundred and fifty dollars apiece for that purpose. I. drew his check on a bank in payment of a draft for his portion which he ordered the bank to send to F. By mistake the draft was sent to the wrong person, but was returned and cancelled. Afterward, A. ordered the bank to send a draft for the same amount to Chicago, but I. was opposed to this and demanded his money of A., who gave him fifty dollars. He then demanded his money of the bank and denied A.'s authority to order the Chicago draft. Having sued the bank for the amount, it was held that A.'s payment should be deducted, and that I., therefore, could recover only the balance, namely, \$100, *Ilgenfritz v. Pettis County Bank*, 21 Mo. App. 558.—A bank official who had been dismissed and who retained of its funds \$1500 as his salary and who was afterward sued on his bond, was permitted to set off so much as was due him for his service at the time the action was brought, *Union Bank v. Heyward*, 15 S. Car. 296.—A note payable on demand may be set off against a deposit without making a demand therefor, *Ketchum v. Stevens*, 6 Duer, 463.—The public administrator of the city of New York can offset against a debt due from him to a bank deposit whether made in his own name, or as public administrator, and also notes issued by it that he may have, *Miller v. Receiver of Franklin Bank*, 1 Paige, 444.

<sup>2</sup> 3 Leigh, 695.

<sup>3</sup> *Knecht v. United States Sav. Institution*, 2 Mo. Ap. 563; *Jordan v. National Shoe & Leather Bank*, 74 N. Y., p. 473.

bank, in fact, was only a debtor for the difference. Had Gregory, in his lifetime, sued the bank for deposit, though it could not set off at law, because his note was not due, yet upon showing in a court of equity, that Gregory and his indorsers were insolvent, there could be no question of its right there, to stop the amount in its own hands. Equitable set-offs or discounts existed prior to and independent of the statute.<sup>1</sup> . . . Although the bank could not, at law,<sup>2</sup> set off a debt payable *in futuro* against a debt due *in presenti*, yet it will scarcely be denied that upon proof of danger of insolvency, equity would stop the payment; for, in equity, it matters not that the debt due to the defendant, which he seeks to set off, is payable *in futuro*. . . If, then, in ordinary cases, where there are mutual debts between two persons, a discount would be allowed, upon its appearing that there was risk of insolvency, although one of the debts may be *solvendum in futuro*, the bank might in Gregory's lifetime, and to the moment of his death, have insisted on retaining his deposit if there was danger of loss. The only doubt that could arise about this is that the deposit of a dealer is, by the usage and custom of the bank, held always subject to his check, notwithstanding he is debtor on an accommodation note. But this usage or custom of dealing cannot be more obligatory on the bank than an express promise to pay the amount of the deposits. And yet an express promise to pay does not exclude the creditor from the right of stoppage or retainer. This has been often decided."

§ 396. **Bank notes of failed bank.** Formerly when banking institutions issued notes, questions arose on the failure of the issuer whether its notes, which were depreciated, could be set off on its claim against its debtors. In some States the notes which a debtor had at the time of its failure could be set off

<sup>1</sup> *Ex parte* Stephens, 11 Ves., Jr., 24; *Ex parte* Blagden, 19 Id. 466; *Ex parte* Flint, 1 Swans. 30.

<sup>2</sup> An allowance by way of set-off must always be founded on an existing demand *in presenti* and not one that may be claimed *in futuro*. *Martin v. Kunzmüller*, 37 N. Y. 396; *Aff.* 10 Bos. 16, the court citing many cases.

against a claim due from him.<sup>1</sup> In other States this could not be done.<sup>2</sup> In none of them, however, could a debtor buy the notes of a failed bank and set them off against his indebtedness.<sup>3</sup>

(a) *Could not be set off against garnishee.* The same principle applies to a garnishee debtor. He cannot set off against his indebtedness to a bank of circulation its notes acquired after the service of the process against him; but he could set off the notes he had before the process was served. This principle was applied in the *Farmers' Bank v. Gettinger*,<sup>4</sup> President Brown saying: "Upon the service of the attachment on the garnishee debtor, the debt became fixed, and the attachment creditor acquired a lien on the debt in the hands of the garnishee, which could not be discharged but by payment or satisfaction, if the attachment be sustained. It could not be affected by after-acquired set-offs, but would be subject to the just and equitable set-offs which the garnishee might *bona fide* have at the time of the service of the attachment upon him. The bank notes of the Farmers' Bank, which the garnishee held *bona fide* at the date of the service of the attachment upon him, was a good set-off against the claim of the attaching creditor of the bank; but the notes of the bank or other set-offs acquired by the garnishee after service of the attachment upon him, and for the purpose of being so set off, could not be so applied as against the attaching creditor."<sup>5</sup>

<sup>1</sup> *Beers v. Maynard*, 1 Bail. Eq. 168.

<sup>2</sup> *Eastern Bank v. Capron*, 22 Conn. 639; *Savings Bank v. Bates*, 8 Id. 505; *Diven v. Phelps*, 34 Barb. 224; *Matter of Receiver of Middle Dist. Bank*, 1 Paige, 585; *Clarke v. Hawkins*, 5 R. I. 219.

<sup>3</sup> *Diven v. Phelps*, *supra*. See § 282.

<sup>4</sup> 4 W. Va. 305.

<sup>5</sup> *Seamon v. Bank*, 4 W. Va. 339; *Brouwer v. Harbeck*, 9 N. Y. 589; *McLaren v. Pennington*, 1 Paige, 102; *American Bank v. Wall*, 56 Me. 167; *Clarke v. Hawkins*, 5 R. I. 219.

*Lien on stock.*

§ 397. **Lien on bank stock created by statute.** A lien on bank stock exists only by charter, statutory law, or agreement. "It is clear that there is no lien at common law against stock for debts in favor of the corporation issuing the stock. . . It is obvious that a different rule would subvert the wholesome doctrine of the common law against secret liens. When such a lien exists it is by statutory authority, either expressed in the act of incorporation or by by-laws made by authority of the act."<sup>1</sup> Hence, the dividend of an insolvent bank, belonging to a stockholder's insolvent estate, cannot be retained to pay his indebtedness to the bank, because neither by charter nor statute has any lien been created.<sup>2</sup>

§ 398. **None on national bank stock.** "It has been expressly decided in the Supreme Court of the United States, that since the National Bank Act of June 3, 1864, went into effect, neither by the Act itself, nor by any by-law based upon any authorized provision in the 'articles of association,' can a national bank create a lien upon the shares of its stockholders for their indebtedness to the bank. That such a lien is contrary to the whole policy of the Act is manifested by the repeal of such a provision in the Act of 1863."<sup>3</sup> But a

<sup>1</sup> Thompson, J., *Steamship Dock Co. v. Heron*, 52 Pa. p. 281.

<sup>2</sup> *Merchants' Bank v. Shouse*, 102 Id. 488.

<sup>3</sup> *Virgin, J., Hagar v. Union Nat. Bank*, 63 Maine, 509; *Bank v. Lanier*, 11 Wall. 369; *Bullard v. Bank*, 18 Id. 589; *Evansville Nat. Bank v. Metropolitan Nat. Bank*, 2 Biss. 527; *Rosenback v. Salt Springs Nat. Bank*, 53 Barb. 495; *Delaware, Lack. & Western R. Co. v. Oxford Iron Co.*, 38 N. J., Eq. 340. Judge Blachford, though, ruled in an early case under the National Bankrupt Law that a bank could maintain a lien on its shares of stock as against the assignee in bankruptcy of the stockholder to protect itself against loss; *In re Bigelow*, 1 N. Bank. Reg. 632 (2d ed.). United States District Judge McDonald ruled the same way; *In re Dunkerson*, 4 Biss. 227; and so did Judge Clifford in 1871, in *Knight v. Old Nat. Bank*, 3 Cliff. 429, after the decision in *Bank v. Lanier*. This opinion contains a good review of the cases.

national bank can hold the cash dividend of a stockholder pledged for his debt.<sup>1</sup>

(a) *Not even by agreement.* Not even by agreement can a national bank stockholder pledge his stock to secure a bank on future indebtedness, for example, the balance due on collections which a banker and a national bank may make for each other.<sup>2</sup>

§ 399. **Can be on State bank stock.** State banking institutions, however, may acquire a lien either by charter or statute to secure the indebtedness of stockholders.<sup>3</sup> Although a lien can be thus acquired through duly authorized articles of association or by-laws,<sup>4</sup> a lien cannot be acquired through a simple delegation of authority to the directors to manage its affairs. If, therefore, a Board of Directors invested with general authority should subject the stock of their bank to a lien, it would not hold against the purchaser of any shares for value and ignorant of the by-law.<sup>5</sup>

(a) *Equitable title.* Even though a bank's charter should prescribe how its stock must be transferred to confer a title on the purchaser, yet an equitable title could be given without following the mode prescribed which the institution would be bound to respect from the time of receiving notice of the transfer.<sup>6</sup> Consequently, debts contracted by the assignor to the bank after receiving such a notice would not be, as against the assignee, liens on the stock.<sup>7</sup>

<sup>1</sup> Hagar v. Union Nat. Bank, 63 Me. 509.

<sup>2</sup> Conklin v. Second Nat. Bank, 45 N. Y. 655.

<sup>3</sup> Burford v. Crandell, 2 Cranch C. C. 86.

<sup>4</sup> M'Dowell v. Bank, 1 Harr. 27; Leggett v. Bank, 24 N. Y. 283; Arnold v. Suffolk Bank, 27 Barb. 424.

<sup>5</sup> Bank of Attica v. Manufacturers & Traders' Bank, 20 N. Y. 501.

<sup>6</sup> Conant v. Seneca County Bank, 1 Ohio St. 298, citing Bank v. Smalley, 2 Cow. 770; Gilbert v. Manchester Iron Manuf. Co., 11 Wend. 627; United States v. Cutts, 1 Sumner C. C. 133; Commercial Bank v. Kortright, 22 Wend. 348; Quiner v. Marblehead Ins. Co., 10 Mass. 476; Sargent v. Franklin Ins. Co., 8 Pick. 90; Union Bank v. Laird, 2 Wheat. 390; Black v. Zacharie, 3 How. 483.

<sup>7</sup> Conant v. Seneca County Bank, 1 Ohio St. 298.

§ 400. **Pledge must be express and debt exist.** To bind a stockholder his pledge must be express, "otherwise," said Judge Mills in *Fitzhugh v. The Bank of Shepardsville*,<sup>1</sup> "the holder of such evidence might delude and impose upon purchasers, and the bank stand as a tacit accomplice in that delusion, and then be permitted to take from an innocent purchaser the title thus acquired." Nor will a pledge of stock for a particular debt give a bank a lien thereon for other debts due from the person for whom the stock is pledged.<sup>2</sup> Nor will a lien on stock for overdrafts on checks include notes or bills to which the pledgor may be a party as maker or indorser at the time of selling and transferring his stock.<sup>3</sup> No lien exists unless there be a debt; and if a stockholder divest himself of his stock by sale, gift, or pledge, which is known by the bank, it cannot claim a lien on later advances.<sup>4</sup>

§ 401. **Entire stock held regardless of amount of debt.** If the debt be less than the value of the stock, the bank can hold the whole until the debt is paid; it is not obliged to appropriate a part and pay the rest.<sup>5</sup> It hardly need be mentioned that a bank may waive its lien and permit a stockholder to sell his stock when such permission is necessary.<sup>6</sup>

§ 402. **Right to pledge depends largely on charter.** (a) *Federal court cases.* The rights of banks and of stockholders are largely determined by the charter or by-laws which relate to the holding, pledging and transfer of stock. The decisions, therefore, rendered in many cases have narrowed down to an inquiry into the nature of the power thus existing. Long ago it was determined that the Bank of Washington had a right under its charter to prevent a transfer on its books of a part of the bank stock of a debtor until the debt was paid,

<sup>1</sup> 3 B. Mon. (Ky.) p. 129.

<sup>2</sup> *Woolley v. Louisville Banking Co.*, 81 Ky. 527.

<sup>3</sup> *Reese v. Bank*, 14 Md. 271.

<sup>4</sup> *Bank v. McNeil*, 10 Bush. 54; *Neale v. Janney*, 2 Cranch C. C. 188.

<sup>5</sup> *Sewall v. Lancaster Bank*, 17 Serg. & Raw. 285.

<sup>6</sup> *National Bank v. Watsontown Bank*, 105 U. S. 217.

although the value of the stock greatly exceeded the amount of the debt.<sup>1</sup> But on the death of one of its stockholders, who was insolvent and indebted to the United States, the bank had no right to set off the dividends accruing on his stock after his death against notes on which he was indorser. The bank had no specific lien on the dividends of its stockholders in consequence of its right to prevent a transfer of the stock until his debt to the bank should be paid.<sup>2</sup>

(b) *Bank v. Pinson*.<sup>3</sup> The third section of the charter of a Mississippi bank provided for a directory and a president, who were empowered to make all needful rules and by-laws for the management of the business of said company, "and the *mode and manner* of transferring its stock." Having this authority the bank enacted a by-law that "the stock of the company shall be assignable only on the books of the company," and no transfer of stock shall be made by any stockholder who shall be indebted to the company; and "certificates of stock shall contain upon them notice of this provision." Certificates of stock were issued to C., which stated the number of shares he owned, their nominal value, and that they were "transferable at the office, in person or by attorney." C. borrowed money from P. on these certificates as collateral security, and assigned them to her by the following indorsement: "For value received, I assign this certificate of stock to P., and authorize her, as my attorney, to demand and have transfer of the same made to her on the books of the company." When P. presented the certificates to the bank and demanded their transfer, it refused to do this because C. was a debtor for more than the value of his stock, and under the by-law above quoted, it had a lien thereon for his indebtedness.

<sup>1</sup> *Pierson v. Bank*, 3 Cranch. C. C., 363.

<sup>2</sup> *Brent v. Bank*, 10 Pet. 596; Aff. 2 Cranch. C. C. 517.

<sup>3</sup> 58 Miss. 422. An agent authorized to sell bank stock belonging to the principal (who was his wife) had the stock transferred to himself on the books of the bank. The agent afterward transferred the stock to the bank. It was declared to be not an innocent purchaser, but held the same as trustee for the principal, *Bank of Louisville v. Gray*, 8 Ky. Law Rep. 664.

At the time of the assignment to P. she had no actual notice of the lien claimed by the bank on C.'s stock. It was held that P. did not have constructive notice by the charter that there would be a by-law preventing a stockholder indebted to the bank from disposing of his stock, but only that there would be some regulation of the mode and manner of the transfer, and that she had the right to presume the regulation was announced in the certificate in the words "transferable at the office in person or by attorney," and was not bound to inquire further. As P., therefore, was an innocent purchaser for value, without notice actual or constructive, of the bank's lien, she held the stock.

(c) *Union Bank of Georgetown*. On the other hand, the charter of the Union Bank of Georgetown provided that the shares should be transferable only on the books of the bank and by the rules that the directors should establish. One of these prescribed that all debts to the bank must be satisfied before a transfer could be made unless the president and directors should determine otherwise. These rules were declared to be notice to all purchasers, and no one could acquire a legal title save by a regular transfer, or an equitable title save in subjection to the rights of the bank.<sup>1</sup>

<sup>1</sup> *Union Bank v. Laird*, 2 Wheat. 390; *Morgan v. Bank*, 8 Serg. & Raw. 73.



## CHAPTER XIX.

## PAYMENT OF THE DEPOSITOR'S NOTES.

§ 403. **Bank's duty to pay depositor's notes.** (a) *Affirmative view.* Not only is a bank required to pay its depositor's checks, but hardly less imperative is the duty to pay his notes when they are made payable there. Judge Rapallo, speaking for the highest court of New York, has remarked: "A note payable at a bank where the maker keeps his account is equivalent to a check drawn by him upon that bank, except that in the case of a note the failure to present for payment does not discharge the maker."<sup>1</sup> The Supreme Court of Pennsylvania has declared that a note which is thus payable at a bank where the maker keeps his deposit is in effect a draft on the institution in favor of the holder and in discharge of the indorser, if there be one.<sup>2</sup> And Chief Justice Marshall has said that "by making a note negotiable in bank, the maker authorizes the bank to advance on his credit to the owner of the note the sum expressed on its face."<sup>3</sup> Moreover, if a bank should not charge the note against the maker's deposit, and should permit it to go to protest, the bank could not recover of the indorser.<sup>4</sup>

(b) *Negative view.* This duty of a bank, however, to pay the depositor's notes which are made payable there whenever his deposit is sufficient, is not admitted everywhere. The courts

<sup>1</sup> *Indig v. National City Bank*, 80 N. Y. p. 106; *Thatcher v. Bank of the State of New York*, 5 Sand. 121; *Ætna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82; *Griffin v. Rice*, 1 Hilt. 184; *Commercial Bank v. Hughes*, 17 Wend. 94; *Beckwith v. Union Bank*, 4 Sand. 604; *Kymer v. Lawrie*, 18 L. J. Q. B. 218.

<sup>2</sup> *Commercial Nat. Bank v. Henninger*, 105 Pa. 496.

<sup>3</sup> *Mandeville v. Union Bank*, 9 Cranch, 9.

<sup>4</sup> *Commercial Nat. Bank v. Henninger*, *supra*.

in Illinois,<sup>1</sup> Indiana,<sup>2</sup> Louisiana<sup>3</sup> and Massachusetts,<sup>4</sup> have not placed this on the roll of duties which banks owe to their depositors.

(c) *The case of the Aetna National Bank v. Fourth National Bank*<sup>5</sup> is interesting in several ways. The Florence Mills deposited with the defendant bank. On the 3d of April the concern had on deposit \$694, but on the previous day it had sent a check for \$4895 in a letter, with the request to "credit our account [with the amount], and charge us our note due the 4th instant." The letter and check were received by the defendant on the 3d of April, and the check was collected and duly credited. On the 3d of April a note of the Florence Mills for \$5000, also payable at the defendant's bank, which was due the day before, and which had been presented for payment and protested for non-payment, was paid by the defendant, and the amount was charged to the depositor. On the next day another note of the Florence Mills for \$5000 belonging to the plaintiff bank was presented at the other for payment, which was refused for lack of funds. The lower courts could not very satisfactorily determine the rights of the parties and the case reached the Court of Appeals. "The Florence Mills," said Judge Allen, "had and kept an ordinary banking account with the defendant, making deposits with and drawing checks upon the latter as occasion required; and

<sup>1</sup> *Wood & Co. v. Merchants' Sav. Loan & Trust Co.*, 41 Ill. 267; *Ridgely Nat. Bank v. Hamilton*, 109 Id. 479.

<sup>2</sup> *Scott v. Shirk*, 60 Ind. 160; *Second Nat. Bank v. Hill*, 76 Id. 223.

<sup>3</sup> *Gordon v. Muchler*, 34 La. Ann. 604.

<sup>4</sup> "A bank is under no obligation whatever to pay a note made payable at its counter, unless the maker has placed funds there for that purpose; and it has not the same means of ascertaining immediately whether it will be paid by the maker that it has of ascertaining whether a check is good. The rule as to checks, therefore, has no application to the payment of notes." *Endicott, J.*, in *Exchange Bank v. Bank of North America*, 132 Mass. p. 150.

A bank where a draft is made payable has no right to pay it, or apply the money deposited there by the acceptor unless by his special direction either verbally, or by check, draft or other writing, *Haines v. McFerren*, 19 Brad. 172.

<sup>5</sup> 46 N. Y. 82.

there was nothing in the transactions or mode of dealing between the parties, to take the account out of the ordinary rules, applicable to bankers' accounts, or vary the rights and obligations resulting from the ordinary course of dealing between bankers and their customers. . . The money was not sent to or received by the defendant as the money of the plaintiff, or a specific fund for the payment of the note held by the plaintiff. . . The direction was to credit the account with this sum, and this direction was complied with; and the relation of debtor and creditor between the defendant and the Florence Mills to the amount appearing upon the books of the bank to the credit of the depositor was the result. The whole sum was at the disposal of the depositor, and subject to his checks; and the duty of the defendant, as well as its agreement, was to discharge the indebtedness by paying the checks of the depositor, and the agreement being with the depositor, the responsibility for a breach of it was to the same party. . . It is not claimed that there was an express promise to or for the benefit of the plaintiff. There was a promise and agreement with the Florence Mills of the character and to the extent indicated, and the law will not imply a promise as a substitute for, or in addition to the express contract of the parties.<sup>1</sup> . . The money deposited to the credit, and going into the general account of the Florence Mills, was payable only upon a proper voucher, upon check, or in payment of an acceptance or promissory note of the depositor, payable at the bank. An acceptance or promissory note thus payable is, if the party is in funds—that is, has the amount to his credit—equivalent to a check, and is, in effect, an order or draft on the banker in favor of the holder for the amount of the note or acceptance. It was so regarded in this case by the parties, and it was in substance a check on the defendant in favor of the plaintiff, with a superadded direction by letter from the drawer to the drawee to pay it when presented. This direction was a work of supererogation,

<sup>1</sup> Whiting v. Sullivan, 7 Mass. 107.

and gave no additional sanction or effect to the previous direction embodied in the note. . . Before this note matured or was presented for payment, the defendant paid upon another note of the same maker, payable at the bank of the defendant, and which, by commercial usage, takes the place of, and is equivalent to a check, and charged the same to the account of the maker, leaving an amount to the credit of the account insufficient to pay the plaintiff. This payment was valid as against the customer of the defendant, the maker of the note, and that corporation has no cause of action against the defendant, either for the money or for not paying the plaintiff's note when presented. The defendant has performed its contract with the Florence Mills, and discharged its obligation to it by honoring its drafts, and was without funds for the payment of the plaintiff's note when presented," and consequently was under no obligation to pay the same.

(d) *Rule in Missouri.* In Missouri, a bank may, but is not required to apply a depositor's balance on a bill or note. Therefore in a suit by a bank against the acceptor of a bill, the fact that the drawer had an account there and that after the protest of the bill a balance was due him, did not prove that he had paid or satisfied it.<sup>1</sup>

(e) *Holder must surrender note.* Moreover, a bank though having a sufficient deposit, is not required to pay the note of a depositor on his oral request, unless the holder is willing to surrender it or to give other evidence of its payment.<sup>2</sup>

§ 404. **Deposit may be applied to discounted note.** (a) *But not on a joint note.* If a bank discount a note for a depositor which is not paid at maturity, his deposit or one subsequently made, whether in the ordinary way or by leaving commercial paper for collection, may be applied to discharge the obliga-

<sup>1</sup> Citizens' Bank v. Carson, 32 Mo. 191.

<sup>2</sup> McEwen v. Davis, 39 Ind. 109. If a bank receive a check from the maker of a note in payment of the same, it cannot after the check is paid refuse to deliver the note on the ground that it has not matured, Union Sav. Association v. Clayton, 6 Mo. App. 587.

tion.<sup>1</sup> But if a bank own a joint and several note executed by A. as principal and B. and C. as sureties, it cannot apply a deposit belonging to A. alone in payment.<sup>2</sup>

§ 405. **Reclaiming deposit applied by agreement.** When the balance of a depositor has been applied by agreement to discharge his note, it cannot be claimed afterward by any one. Chase requested a bank to pay a debt for him and agreed to apply his balance in repayment. The bank paid the debt and Chase gave his note for the amount, agreeing also soon to adjust his balance. Before the adjustment was made the bank failed and the receiver sought to recover the balance, but the court decided that the transaction was a contract under which the bank advanced the money in consideration of Chase's agreement that the funds should be so appropriated. After the bank had advanced the money Chase had no legal right to withdraw the funds and the bank might have withheld them. "Nor were they liable to be attached by his creditors as against the bank, for they were appropriated by the agreement of the parties to the payment of the money which the bank had advanced on Chase's account. If, therefore, Chase could not have withdrawn the funds, and if they were not liable to an attachment at the suit of his creditors, neither the bank nor its creditors have any right to refuse to have them deducted from the amount of the note."<sup>3</sup>

§ 406. **Must follow depositor's direction.** If a depositor give a specific direction concerning the payment of a note payable at a bank, this must be followed.<sup>4</sup> If, however, the

<sup>1</sup> *Muench v. Valley Nat. Bank*, 11 Mo. App. 144, citing *Jourdain v. Lefevre*, 1 Esp. 66; *Scott v. Franklin*, 15 East, 428; *Ex parte Pease*, 1 Rose, 232; *Ex parte Pease*, 19 Ves., Jr. 25.

<sup>2</sup> *Dawson v. Real Estate Bank*, 5 Ark. 283.

<sup>3</sup> *Chase v. Petrolenm Bank*, 66 Pa. 169.

<sup>4</sup> *Egerton v. Fulton Nat. Bank*, 43 How. Pr. 216; *Bank of United States v. Macalester*, 9 Pa. 475; *Wilson v. Dawson*, 52 Ind. 513. When the holder of a promissory note delivers the same to a bank and directs an appropriation of the proceeds in a specific manner, the bank may realize these either by discounting the note or collecting it of the maker at maturity, unless the holder shall direct the course to be taken, *Drown v. Pawtucket Bank*, 15 Pick. 88.

drawer of a draft send notice to the bank where it is payable not to pay the same, and the notice is not received until after payment has been made, the bank will not be liable, although the payee-depositor may have an abundant deposit for that purpose.<sup>1</sup> In *Wilson v. Dawson*,<sup>2</sup> the principal of a note due to a banking firm after its maturity deposited and checked out by agreement more than the amount of the note. The surety claimed that the money thus deposited ought to have been applied by the bank on the note, but the court decided otherwise, and consequently the surety was not discharged.

§ 407. **Payment of note by stranger.** When a stranger who is bound on a note pays the same to the bank having possession of it, the instrument is discharged as effectually as though it were paid by the maker.<sup>3</sup> In *Citizens' Bank v. Lay*,<sup>4</sup> the person who paid the note did so in fulfilment of his contract with the maker. This act discharged the obligation. "It is certain that the maker was discharged by the payment to the bank, and the law is well settled that after payment at maturity a note cannot be reissued, so as to charge any party thereto who otherwise would be discharged, unless with his knowledge and consent."<sup>5</sup>

(a) *Note made payable there by non-depositor.* So, too, a non-depositor who makes an obligation payable at a bank and leaves funds there for the discharge of it at the proper time, is discharged from further liability. In *Lazier v. Horan*,<sup>6</sup> Judge Rothrock, after remarking that on this question there was "a surprising paucity of adjudications," thus continued: "When a note is made payable at a bank the parties expect the collection to be made through the bank. It is true, when

<sup>1</sup> *Weedsport Bank v. Park Bank*, 2 Keyes, 561.

<sup>2</sup> 52 Ind. 513.

<sup>3</sup> *Lancey v. Clark*, 64 N. Y. 209; *Eastman v. Plumer*, 32 N. H. 238; *Dooley v. Virginia Fire & Marine Ins. Co.*, 3 Hughes, 221.

<sup>4</sup> 80 Va. 436.

<sup>5</sup> *Burbridge v. Manners*, 3 Camp. 193; *Gardner v. Maynard*, 7 Allen, 456. When a note is deposited for collection with a bank where it is payable, its payment to the bank absolutely discharges the maker, *Smith v. Essex County Bank*, 22 Barb. 627.

<sup>6</sup> 55 Iowa, 75.

the defendant [in the case under consideration] deposited the money, the bank, while holding it, was technically the agent of the depositor. But the money was deposited for the holder of the note, and it required no act of the depositor to authorize the bank to pay the note. If the customer of a banker accept a bill, and make it payable at his banker's, that is of itself a sufficient authority to the banker to apply the customer's funds in paying the bill.<sup>1</sup> And if money be deposited for the payment of such a bill or note, the holder may maintain an action against the bank therefor.<sup>2</sup> By the very terms of the contract the defendant agreed to pay the note at the bank. Now, while it is a general rule that payment of a note or bill should be made to the actual holder, yet when the parties have contracted that payment may be made at a bank, it means that payment is to be made to the bank. The parties to the note did not contemplate that the payee should make a journey from Indianapolis [where he lived] and meet the maker at Allen's bank [where the note was payable], and there receive his money from the hands of the maker and deliver him the note. This court has three times determined that when the maker of a promissory note payable in personal property, to be delivered at a specified time and place, makes a tender of the specific articles and sets them apart at the time and place stipulated, and the creditor is not there to receive, or refuses to accept the property, the debt is thereby discharged, and the title of the property passes to the creditor." In one of these cases the note provided for payment in brick. "If that could be discharged by delivering the brick set apart for the creditor at the time and place designated, it is difficult to see why, if the note was payable in dollars, it would not equally be a discharge to set apart and deposit the dollars for the holder of the note." In the case of *Thatcher v. Bank*,<sup>3</sup> a deposit was made by a person

<sup>1</sup> Byles on Bills, 151.

<sup>2</sup> Parsons on Com. Law, 130.

<sup>3</sup> 5 Sand. 121. *Earl, C.*, said in *East River Nat. Bank v. Gove*, 57 N. Y. p. 602, that this case was affirmed by the Court of Appeals.

for the payment of an accepted bill payable at that bank. The bill was not paid, and the drawee, Thatcher, sued the bank for the damages he had sustained. It was decided that while the duty of a bank to pay the notes or other obligations of its depositors payable there might be implied, no such duty existed with respect to strangers. The duty, therefore, whenever existing, must be based on agreement made with a proper officer of the bank. As such agreement was not proved in this case, the deposit having been made with the paying teller, who had no right to receive it or to make any agreement with the depositor, Thatcher could not recover.

(b) *Stranger can withdraw his deposit.* If a stranger, for example, the acceptor of an overdue draft, should deposit money to pay the instrument, he can withdraw the same. And if he should do so, the drawers of the instrument, to whom it has previously been returned as dishonored, cannot maintain an action against the bank. Thus Higbee & Co. drew a draft on G. payable at a bank which was accepted. It was dishonored, however, and returned to the drawers. G. then sent his brother to the bank with money to apply on the draft. It was deposited to G.'s credit, and a receipt was given stating that it was to pay Higbee & Co.'s draft. Afterward G. withdrew the deposit and returned the receipt. In an action by the drawers against the bank to recover the amount they failed, the court saying that "the deposit of the money to pay the draft was not an equitable assignment of the fund. Had it been deposited to the credit of Higbee & Co. to meet the draft the case would have been different. But it was not, nor could it well have been without risk to Gillespie, as the draft might have been discounted and held by other parties. The money was deposited to the credit of Gillespie, and the bank could not have refused to pay it out on his check. It could not have paid it to Higbee & Co. because it had no such order; it had no knowledge even that they ever owned the draft; the draft itself was not there, and there could, therefore, have been no application to its pay-



ment. There was at most a direction to apply the money, which was a mere executory order and revocable.<sup>1</sup>

§ 408. **Can deposit be applied before the last day of grace.** Admitting, therefore, that a bank has the right to pay a note or bill of its depositor made payable there if having adequate funds belonging to him, has a bank the right to apply them on a depositor's note before the close of the last day of grace? We know of no better statement of the law than Judge Endicott's:<sup>2</sup> "A note entitled to grace is payable on demand at any reasonable time and place on the last day of grace, and, if not paid, an action may be brought forthwith against the maker. But if no such demand is made, the maker has the whole day in which to make payment."<sup>3</sup> When a note is made payable at a bank the contract is that it shall be paid at some time during the banking hours of the bank, and a demand for payment may be made at any time during those hours. If no demand is made the maker of the note is not in default until the close of business at the bank on that day.<sup>4</sup> If a formal demand is made during banking hours, by the holder of the note, at the bank where it is payable, and there are then no funds, it is the duty of the bank to say there are no funds; and there is then a breach of the contract on the part of the maker, and notice thereof would bind the indorsers. There is no necessity for a personal demand on the maker elsewhere, for he has made it payable at the bank and the demand may be made there. But if no such demand is made and the note is only sent or placed in the bank for collection, then the maker has till the close of business hours to make payment."

<sup>1</sup> First Nat. Bank v. Higbee & Co., Pa. Sup. Ct., 16 Week. No. Cas. 415, citing Gibson v. Minet, 2 Bing. 7; Geist's Appeal, 41 Leg. Int. 500.

<sup>2</sup> Exchange Bank v. Bank of N. America, 132 Mass. p. 148; see Home Nat. Bank v. Newton, 8 Brad. 563.

<sup>3</sup> Gordon v. Parmelee, 15 Gray, 413; Estes v. Tower, 102 Mass. 65; Pierce v. Cate, 12 Cush. 190.

<sup>4</sup> Church v. Clark, 21 Pick. 310; Clark v. Eldridge, 13 Met. 96; United States Bank v. Carneal, 2 Pet. 543; Staples v. Franklin Bank, 1 Met. 43.

§ 409. **Application of deposit after protest of note.** If a deposit be made sufficient to pay a note after it has been protested, this does not operate as payment between the bank and indorser. The act does not indicate an intention by the depositor or the bank to thus apply it. In the absence of any direction or agreement to that effect it is optional with a bank to apply such a deposit in payment; it is under no obligation to do so.<sup>1</sup> If the application be postponed until after recovering judgment on the note, the right will not be affected, for the bank may apply the money after as well as before the recovery of judgment in paying a debt due from a depositor. Whether the application is made or not is immaterial. If not made the bank may, in an action by the depositor or his assignee to recover the money deposited, use the judgment thus obtained as a set-off against the demand.<sup>2</sup>

§ 410. **Part payment.** With respect to part payment of a note payable at a bank, it can decline to pay or apply what funds it has belonging to the depositor. In *Kymer v. Laurie*,<sup>3</sup> bankers having £20 belonging to their depositor, paid an acceptance of £42 when it became due. Patteson, J., said that "the plaintiff, by making the acceptance payable at the defendants', clearly authorized them to pay it, and if the balance in his favor had been £42 . . they would have been bound to pay it, unless the plaintiff, before it was presented had countermanded that authority. They were not, indeed, bound to pay it under the existing circumstances, because they had not sufficient funds; but they were fully authorized to apply what funds of the plaintiff they had towards the payment." Whether they could recover the balance of the £42 was not determined. "That question," said the court, "might depend on the course of their dealings and other circumstances."

<sup>1</sup> *National Bank v. Smith*, 66 N. Y. 271; *Marsh v. Oneida Central Bank*, 34 Barb. 298; *Pitts v. Congdon*, 2 N. Y. 352; *Beardsley v. Warner*, 6 Wend. 610.

<sup>2</sup> *Marsh v. Oneida Central Bank*, 34 Barb. 298.

<sup>3</sup> 18 L. J., Q. B. N. S. 218.

§ 411. **Cannot retain deposit to pay unmatured note.** A bank has no right to retain the money of a depositor to meet his note which is not due,<sup>1</sup> or one which he has guaranteed. "A debtor in one sum has no lien upon it in his hands for the payment of a debt owed by him which has not yet matured; nor has a bank more than any other debtor."<sup>2</sup> And if a bank assign, the depositor may insist on the payment of his note, even if it be not due at the time of the assignment.<sup>3</sup> A note payable *at* a bank is payable *in* the bank, and a note payable *at* or *in* a bank is payable to the holder or his agent in the bank at its counter.<sup>4</sup>

§ 412. **Bank is not payee's agent by making it payable there.** The making of a note payable at a bank does not make it the agent of the payee to receive payment unless the officers are disposed to accept the agency. In *Pease v. Warren*<sup>5</sup> the assignee of a mortgage given to secure notes made payable at a bank presented them for payment at due time with the accompanying papers. The mortgagor objecting to pay on the ground that the payee had not indorsed the notes, deposited the money needful for that purpose with the bank, instructing its officers to apply it on the notes. Having refused to obey the instructions, it was held that the money was not subject to the control of the holder of the notes, and therefore would not operate as payment.

§ 413. **Maker's recovery of deposit when bank is bankrupt.** If a bank become bankrupt which has received the amount of a note from the maker in advance of maturity for the

<sup>1</sup> *Commercial Nat. Bank v. Proctor*, 98 Ill. 558.

<sup>2</sup> *Folger, J.*, in *Jordan v. National Shoe & Leather Bank*, 74 N. Y. p. 473; *State Sav. Association v. Boatmen's Sav. Bank*, 11 Mo. App. 292. See § 414.

<sup>3</sup> *McCagg v. Woodman*, 28 Ill. 84.

<sup>4</sup> *Davis v. McAlpine*, 10 Ind. 137.

<sup>5</sup> 29 Mich. 9. If a depositor leave a check with the teller and direct him to take up a note if presented there on which he is liable as indorser, the teller is his agent, consequently, if he neglect to apply the check as directed the bank is not liable, *Newark India Rubber Manuf. Co. v. Bishop*, 3 E. D. Smith, 48. In this case the money was deposited solely with the teller, see also *Thatcher v. Bank*, 5 Sand. p. 131.

express purpose of discharging the same, he can follow and recover the money.<sup>1</sup>

§ 414. **Retaining of deposit to pay note maturing after maker's death.** If a depositor die the bank cannot retain his deposit to discharge his liability on notes of which he was the indorsee which were discounted for his benefit but due and protested after his death.<sup>2</sup>

§ 415. **Cannot apply surplus for security of note on general balance.** If a bank have collateral security for the note of a depositor, which is sold, it cannot apply the surplus to discharge a general balance due from him. For as the bank could not hold the security if the note were paid at maturity, no larger right in the security can be acquired by delay in payment.<sup>3</sup> Nor can a bank to which a mortgage is given "as collateral security for notes discounted or hereafter to be discounted," claim the proceeds arising from the sale of such mortgaged property in payment of notes discounted after the entry of judgment on which it was sold, for the benefit of another creditor, and thus deprive him of his lien and the discharge of his debt.<sup>4</sup>

(a) *Suit to recover security.* If a bank decline for any reason to return the security when the debt becomes due, the owner must tender the amount before bringing his action to recover the pledge. Thus C. sued a savings institution for converting stock which had been deposited with it as collateral security. C. offered to pay the note, which had been given for the debt on the surrender of the collateral security, but was informed that both the note and the stock were lost. He, therefore, began his suit without making a tender of the amount of the debt. Speaking for the court, Judge Field said: "We think that the assumption is false, that a contract of pledge, as a security for the payment of money, is analo-

<sup>1</sup> *Ellicott v. Barnes*, 31 Kan. 170; *Peak v. Ellicott*, 30 Id. 156.

<sup>2</sup> *Appeal of Farmers & Mechanics' Bank*, 48 Pa. 57.

<sup>3</sup> *Hathaway v. Fall River Nat. Bank*, 131 Mass. 14; *Brown v. New Bedford Institution*, 137 Id. 262.

<sup>4</sup> *Appeal of the Bank of Commerce*, 44 Pa. 423. See § 382 c.

gous to a bilateral executory contract, in which the two parties mutually promise to do concurrent acts, and the promise of one is the consideration of the promise of the other. The modern authorities, therefore, require a tender of payment of the debt to enable the pledgor to maintain trover for a conversion of property pledged, unless the lien created by the pledge has been otherwise discharged. The distinction between a tender of payment of a debt due and an offer to perform one of two mutual promises to do concurrent acts is well known.<sup>1</sup> . . . The contract of the defendant was to keep the certificates of stock with due care, and to return them to the plaintiff if the note was paid at maturity, or when, after maturity, the note was paid, unless the stock was meanwhile lawfully sold to pay the debt. The contract of pledge is collateral to the contract to pay the debt. The promise is to return the property pledged when the debt is paid. The pledgee can maintain an action to recover the debt without any offer to restore the property pledged, and he can maintain an action for money lent after he has converted the property pledged by an unlawful sale, and can recover the amount of the debt less the amount realized by the sale, if the defendant pleads this in set-off."<sup>2</sup>

§ 416. **Can indorser's deposit be applied.** Can a bank use the deposit of an indorser for paying a note? In *Ticonic Bank v. Johnson*<sup>3</sup> a note was discounted for the benefit of the first indorser, and the avails were credited to his account. He afterward drew checks against the amount, but whether the whole had been actually paid out at the time the note fell due or not, did not appear. The court declared that the bank might have retained a balance remaining deposited to the indorser's credit when the note became due if it had thought proper to do so. "It was clearly optional with the bank to do so or not."<sup>4</sup>

<sup>1</sup> *Cook v. Doggett*, 2 Allen, 439.

<sup>2</sup> *Cumnock v. Institution for Savings*, 142 Mass. 342.

<sup>3</sup> 21 Me. 426.

<sup>4</sup> See § 389 c.

§ 417. **Bank need not hold deposit to secure indorser.** (a) *Remarks of Gray, C. J.* A bank is not required to hold a deposit for the protection of an indorser of the depositor. In other words, if the deposits of the maker of a note are not sufficient at its maturity to pay it, the bank is not required for the protection of the indorser to apply the subsequent deposits of the maker on the obligation.<sup>1</sup> The weighty words of Gray, C. J., in *National Mahaiwe Bank v. Peck*<sup>2</sup> are worth adding. "So long as the balance of account to the credit of the depositor exceeds the amount of any debts due and payable by him to the bank, the bank is bound to honor his checks and liable to an action by him if it does not. When he owes to the bank independent debts, already due and payable, the bank has the right to apply the balance of his general account to the satisfaction of any such debts of his. But if the bank, instead of so applying the balance, sees fit to allow him to draw it out, neither the depositor nor any other person can afterwards insist that it should have been so applied. The bank, being the absolute owner of the money deposited, and being a mere debtor to the depositor for his balance of account, holds no property in which the depositor has any title or right of which a surety on an independent debt from him to the bank can avail himself. . . The right of the bank to apply the balance of account to the satisfaction of such a debt is rather in the nature of a set-off, or of an application of payments, neither of which, in the absence of express agreement or appropriation, will be required by the law to be so made as to benefit the surety."<sup>3</sup>

(b) *His statement of rule.* "The general rule accordingly is, that where moneys drawn out and moneys paid in, or other

<sup>1</sup> *People's Bank of Wilkes-Barre v. Legrand*, 103 Pa. 309; *First Nat. Bank v. Zahm*, 16 Week. No. Cas. 552; *Martin v. Mechanics' Bank*, 6 Harr. & Johns. 235; *National Bank v. Smith*, 66 N. Y. 271; *Voss v. German American Bank*, 83 Ill. 599.

<sup>2</sup> 127 Mass. 298.

<sup>3</sup> *Glazier v. Douglass*, 32 Conn. 393; *Field v. Holland*, 6 Cranch, 8, 28; *Brewer v. Knapp*, 1 Pick. 332; *Upham v. Lefavour*, 11 Met. 174; *Bank of Bengal v. Radakissen Mitter*, 4 Moore, P. C., 140, 162.

debts and credits, are entered, by the consent of both parties in the general banking account of a depositor, a balance may be considered as struck at the date of each payment or entry on either side of the account, but where by express agreement or by a course of dealing between the depositor and the banker, a certain note or bond of the depositor is not included in the general account, any balance due from the banker to the depositor is not to be applied in satisfaction of that note or bond, even for the benefit of a surety thereon, except at the election of the banker."<sup>1</sup>

(c) *Opinion of New York Court of Appeals.* Likewise in New York when a note became due at a bank and was unpaid for lack of funds, and subsequently a sufficient sum to pay it was deposited which, however, the bank applied on another note that became due after the first one, it was held in a suit by the bank against the indorser that he had no reason for complaining of the action of the bank in applying the money. "The note had matured, and the liability of both [the maker and the indorser] had become fixed and absolute before the deposit was made; and there was no appropriation of the money to the note in suit by either the debtor or the creditor, and [there were] no circumstances making the inference of such intent necessary. On the contrary, the act of making a general deposit of the money on account without any reference to the note in suit by the debtor or creditor, indicates that the deposit was not designed or received as a payment of the note in suit, and the acquiescence, so far as appears, of the depositor in the subsequent appropriation of the money affords evidence that there was no intention of applying to the note in suit."<sup>2</sup> This opinion of the Supreme

<sup>1</sup> The learned judge cites many authorities. In Delaware, however, the contrary doctrine is held, *McDowell v. Bank*, 1 Harr. 369.

When a bank sues the indorser on a note he cannot have its stock that he may own deducted from the note, but he can have the money or other funds belonging to him in the bank's possession, *Whittington v. Farmers' Bank*, 5 Harr. & Johns. 489.

<sup>2</sup> *National Bank v. Smith*, 5 Hun, 183.

Court was affirmed by the Court of Appeals with the remark that "the general deposit of money afterwards without regard to the note did not, of itself, operate as a payment. On the contrary, as there was no agreement that the money deposited was to be appropriated for such a purpose, the act itself indicates that there was no intention by the depositor or the plaintiff to apply it upon the note."<sup>1</sup>

§ 418. **Payment of note principal and surety.** (a) *Second National Bank v. Hill.*<sup>2</sup> When a note payable at a bank is executed by one person as principal and by others as sureties, what is the duty of the bank with respect to applying the funds of the principal on deposit there in payment? The bank may apply the principal's deposit on the note, but, if this be not done, the surety is not discharged. In Indiana, in a well-reasoned case, the court says that "the question is not what the creditor might or could have done, but was he obliged to do this or discharge the surety? The creditor might sue the principal debtor as soon as the debt matured, and thereby save the surety from future hazard, but he is not obliged to sue. He may delay the collection of his debt even until the principal debtor fails, without discharging the surety. To hold that the bank was obliged to apply the deposits [of the principal] to the payment of the note would be to compel him to collect his debt, though none of the parties bound to pay it had requested him to so."

(b) *Nature of principal's deposit.* It may be further remarked that a deposit by the principal debtor in such a case is not a trust fund held by the bank for the benefit of the sureties. The deposit is not a collateral security for the debt due from the principal and sureties to the bank.<sup>3</sup>

<sup>1</sup> 66 N. Y. 271.

<sup>2</sup> 76 Ind. 223, p. 227, citing *Voss v. German American Bank*, 83 Ill. 599; *McDowell v. Bank*, 1 Harr. 369; *Law v. East India Co.*, 4 Ves., Jr., 824; *Martin v. Mechanics' Bank*, 6 Harr. & Johns. 235; *Glazier v. Douglass*, 32 Conn. 393; *Pease v. Hirst*, 5 Man. & R. 88.

<sup>3</sup> *Second Nat. Bank v. Hill*, 76 Ind. 223, citing *Philbrooks v. McEwen*, 29 Id. 347; *Hampton v. Levy*, 1 McCord Ch. 107; *Lang v. Brevard*, 3 Strob. Eq. 559.



(c) *Weirick v. Mahoning County Bank*.<sup>1</sup> A note was made by W. as principal, and K. as surety for the benefit of A. who received the money from an Ohio bank of discount. A. directed W. to sell a flock of sheep for him in Pennsylvania, which he did, depositing the money in a Philadelphia bank, to the credit of the other, which was a correspondent. The Philadelphia bank notified the other bank of the deposit, and also notified W. He delivered the letter to A. with his indorsement, "pay the within to A." A. presented the letter to the Ohio bank and desired to be credited with the amount, which was done, and afterward he drew the money. Having failed, the Ohio bank sued the principal and surety on the note, who defended on the ground that the money deposited in the Philadelphia bank, as above described, ought to have been applied on the note. But the court held that W. gave A. full control of it, and therefore he had a right to deposit and draw it as he pleased.

(d) *In the case of the First National Bank v. Zahm's Executors*,<sup>2</sup> a promissory note was indorsed by A. the day it became due in the following manner: "I hereby guarantee the payment of the within note without protest." About two weeks afterward, B., one of the indorsers of the note, at the cashier's request, gave the bank which had discounted it the following guaranty: "I hereby guarantee the payment of all notes drawn by C. and D. [the makers of the note in question] and indorsed by me, now held by the First Nat. Bank of L., either matured or to mature." The note was neither paid nor protested at maturity, and the makers having become insolvent, the bank sued A.'s executors on his guaranty. The bank showed that in consideration of the guaranty the note was not protested and that B. neither waived protest nor did any other act except to execute his guaranty to continue his liability. The bank therefore recovered. Moreover, the mere knowledge by B. at the maturity of the note that it had not been paid was not, in the absence of a protest, sufficient

<sup>1</sup> 16 Ohio St. 296.

<sup>2</sup> 16 Week. No. Cas. 552.

notice to continue his liability as indorser, which would be prior to A.'s liability as guarantor. The subsequent guaranty given by B. simply created a liability against him as guarantor which the bank might enforce after failing to collect from the makers and from A., the prior guarantor.<sup>1</sup>

§ 419. **Application of rules of demand and notice.** (a) *Presentation at bank not necessary to fix liability of maker.* Promissory notes payable at a bank are governed by the rules that apply to other notes of the same nature, and payment must be demanded and notice given to indorsers, of a refusal to pay.<sup>2</sup> Hence, they are entitled to days of grace,<sup>3</sup> and if payment be demanded before the last day they are not holden.<sup>4</sup> But indorsers may waive the notice of non-payment by agreement.<sup>5</sup>

(b) *With respect to a note made payable at a bank,* presentation there for payment is not necessary to fix the liability of the maker; but if he is there and ready to pay it at maturity, or has funds there for that purpose, and suffers loss by the failure of the holder to present it, this can be claimed of the holder.<sup>6</sup>

(c) *Effect of making and dating a note at a particular place.* "The making and dating of a note at a particular place is not equivalent to making it payable there; nor does it supersede the necessity for presentment and demand at the residence or place of business of the maker in order to charge the indorsers. . . Where no residence or place of business can be found, an inquiry at the place of the date of the note might perhaps be regarded as essential in the exercise of due diligence. . . A person who takes a promissory note, by

<sup>1</sup> First trial, 103 Pa. 576; see *First Nat. Bank v. Hartman*, 16 Week. No. Cas. 555.

<sup>2</sup> *Mims v. Central Bank*, 2 Ala. 294; *McDougald v. Rutherford*, 30 Id. 253.

<sup>3</sup> *Tarver v. Boykin*, 6 Ala. 353; *Crenshaw v. M'Kiernan*, Minor, Id. 295.

<sup>4</sup> *Jones v. Fales*, 4 Mass. 245.

<sup>5</sup> *Rooker v. Morris*, 61 Ind. 286.

<sup>6</sup> *Sims v. National Com. Bank*, 73 Ala. 248. If a bank be designated as the place at which a purchase-money note is to be paid, the maker is not bound to pay it until the note is received at the bank, *Robinson v. Cheney*, 17 Neb. 673; *Ballard v. Cheney*, 19 Id. 58.

indorsement, if he proposes to hold the indorser, takes it with the knowledge that at its maturity a proper demand must be made upon the maker for payment, and he is under obligations, at the time he receives it, or in due time afterwards, to know, or at least to inquire, where the maker lives; if he does not, and refrains from all inquiry, he should suffer the consequences of not being able to make a regular demand. In view of the peculiarities of the contract of indorsement, and the rights and responsibilities resulting therefrom, the holder of a promissory note should certainly be held to the exercise of such diligence, in this respect, as ordinary foresight and prudence would suggest; and, in the absence of any effort, he should, we think, be held to be affected with knowledge of that which by reasonable diligence he could readily have ascertained.”<sup>1</sup>

<sup>1</sup> Clark, J., *Oxnard v. Varnum*, 111 Pa. 193, pp. 199, 201.

## CHAPTER XX.

## PAYMENT THROUGH THE CLEARING HOUSE.

By far the greater portion of checks are deposited in other banks, and are finally settled at the clearing house. The mode of settling or clearing checks through this means may be thus briefly described: "At a fixed hour, each day, representatives of the banks meet at a specified place called a clearing house, and exchange the checks or other papers which they hold against one another. The paper which the banks take to the clearing house is called the exchange, and the total amount of paper exchanged is called the clearings, or exchanges. Those banks which bring to the clearing house a less amount in checks or other paper than they take away,—called debtor banks—pay at a later hour on the same day to the banks which bring more than they take away—called creditor banks—a balance, either directly or through the clearing house, in cash or its equivalent. The payment of the balances by the debtor banks, and the receipts of these balances by the creditor banks, complete each day's settlement. As the aggregate amount brought is always the same as the amount taken away, so the balances due from the debtor banks must be exactly equal to the amount due to the creditor banks."<sup>1</sup>

§ 420. **Force of clearing house regulations.** (a) *A New Orleans clearing house case.* These institutions have made rules for the management of their business, and some legal questions have arisen concerning them.<sup>2</sup> The first question to be

<sup>1</sup> Practical Banking, 222.

<sup>2</sup> A clearing house due bill is not a mere certificate of deposit creating a contract of bailment, but is negotiable, like a check payable to bearer, and is unfettered by any special condition or stipulation. It is also "simple" in terms, "certain" in amount, "unconditional" in manner of payment, and

answered is what is the force of clearing house regulations. The following case has been decided in Louisiana. By the rules of the New Orleans bank clearing house, the hour for making exchanges is nine o'clock. All errors in exchanges and claims arising from the return of checks from any cause must be adjusted before eleven o'clock. Half an hour later the creditor banks receive the clearing house manager's checks on the debtor banks in settlement of the respective balances due them. Should any bank not be able to pay the balance against it, resulting from the exchanges of that day, it must inform the manager and also the other banks of such inability by ten o'clock of the same day, and must hold in trust until demanded all checks received by it from the banks at the morning exchange of that day. As soon as the manager is informed of the inability of any bank to pay its checks drawn, or to be drawn against it for the balance due, he must strike from the list of exchanges both debit and credit of the defaulting member and readjust the balance as though that member had not appeared for exchange on that day. In this case the Mechanics & Traders' Bank was a defaulter, but it did not inform the manager, nor the other banks of its inability to pay, as the rule required, hoping to meet its indebtedness. In consequence of not receiving this notice, the defendant bank placed the checks on the other, which it had received the day before, to the credit of each depositor. Immediately after the default occurred, the cashier of the Mechanics' Bank and one of the commissioners who was put in charge of the institution, demanded of the defendant bank the checks of the Mechanics' in its possession that had been received the day before, amounting to \$4967.57. The defendant bank offered to pay only the difference between this amount and the amount of checks held against it by the other, namely,

subject to no "contingency." If a bill be given and stolen on the same day, and notice is given to the bank, and through it to the other banks the issuing bank is entitled to require from the owner of the bill a bond of indemnity before paying the same, *Phila. Com. Pleas, Dutton v. Merchants' Nat. Bank*, 16 *Phila.* 94.

\$1266.71. A suit was then brought to recover the amount, but failed, the court saying that "not only was the defendant authorized by this silence of the Mechanics' Bank to treat the checks it held against that bank as paid, but there was express and positive action to that effect. The Mechanics' at nine o'clock at the clearing house tendered and produced the checks it held on the defendant against the counter checks held by the defendant on it, thereby declaring in effect to the defendant that the checks it held were treated as paid by the like amount of checks upon it, and this regardless and independent of the rules of the clearing house. The defendant acted on that, as it had a right to. These mutual credits could not be recalled afterwards by either one of the parties to the detriment of the other."

(b) *With respect to the clearing house rule* above mentioned, this, the court remarked, was "for the guidance of the manager of the clearing house, and cannot effect, much less control, the legal consequences of a virtual payment made by one bank to another, or settlement each with the other in the ordinary business manner. Besides, the Mechanics' Bank forfeited or waived its right to the benefit accruing from that rule by not complying with an essential requirement of it, viz: giving notice by 10 A. M. to the other banks and thus bringing to the knowledge of the defendant its disabled condition. Had that been done, the defendant would not have passed the several checks to the credit of its depositors. The defendant could not revoke those credits to the prejudice of its depositors. No more can the Mechanics' Bank, or those who claim to represent it, revoke its settlement to the prejudice of the defendant."<sup>1</sup>

§ 421. **Regulations do not affect depositors.** Whatever be the force of the rules of a clearing house association, they do not affect depositors. Says Judge Devens: "To the regulations of this association, the customers of the banks are not parties, and, whatever effect is to be given to them as

<sup>1</sup> *Blaffer v. Bank*, 35 La. Ann. 251.

between the banks, their customers are not in a situation to claim the benefit of them, nor are they liable to be injuriously affected by them.”<sup>1</sup> “Such an association,” said Whelpley, C. J., in *Overman v. Hoboken City Bank*,<sup>2</sup> “can have no power to make usages or rules to bind those who are not parties to its organization. Its rules and usages, if not in conflict with law, may by the implication of tacit adoption in the contracts of members, bind them in the same way that a general usage in trade may bind those who deal with reference to it, and are therefore held implicitly to adopt it.”<sup>3</sup> But those who are not bound by such usages, and have not contracted with reference to them have no right to avail themselves of them to create an obligation against those who are parties to their adoption, and bound by them *inter sese* only.”

§ 422. **Effect of clearing house usages.** We may next inquire how far banks are affected by usage concerning clearing house business. In an important Baltimore case relating to a forged check the drawee bank having made the deposit good for the amount, it sought to recover the same from the bank whence it came on the ground that “a general and well-established usage of the banks in Baltimore to the effect that where one bank sends to the clearing house a check on another bank, payable to order and purporting to be indorsed by the payee, the bank sending it guarantees the indorsement of the check to be the genuine indorsement of such payee.” The court did not say whether any such usage existed or not, but decided the case against the bank that brought the suit on another ground, its own negligence. For the same reason no answer was given to the question of an alleged usage among the banks “not to receive deposits from strangers without identification.”<sup>4</sup>

§ 423. **Recovery of money paid on checks by mistake.** Occasionally banks pay checks by mistake, as we have seen, and

<sup>1</sup> *Merchants' Nat. Bank v. National Bank*, 139 Mass. p. 518; *Manufacturers' Nat. Bank v. Thompson*, 129 Id. p. 439.

<sup>2</sup> 30 N. J. Law, p. 63.

<sup>3</sup> *Robeson v. Burnett*, 2 Taunt. 388.

<sup>4</sup> *Commercial & Farmers' Nat. Bank v. First Nat. Bank*, 30 Md. 11, p. 24.

if this happen when payment is made through the clearing house, how is their right of recovery affected by the rules that regulate the mode of transacting business by that institution? Several cases have been reported which will be described.

(a) *Merchants' National Bank v. National Bank*.<sup>1</sup> A demand was made by a bank on B. for payment of demand notes which were then deemed to be amply secured by a pledge of goods as collateral security. Two days after this, B., who was a director in the bank, told the president that he had sold, or had agreed to sell, a portion of the goods, and the warehouse receipts were delivered to him, as agent of the bank, to enable him to transfer the goods sold with the understanding that the money received should be applied on the debt for which they were held as collateral security. About a week afterward B. wrongfully deposited the money received from the sale to his own account in the bank, and three days later he drew a check thereon which was paid by that bank to another bank through the clearing house, of which both banks were members. The president of the drawee bank suspecting that B. was financially embarrassed, discovered that he had made no payment on account of the goods entrusted to him for sale, and, looking at the condition of B.'s account, directed the return of the check to the other bank, although it was after one o'clock in the day of receiving it. By the rules of the clearing house, checks not good which were sent through it for payment must be returned to the sender as soon as this should be found out, "and in no case shall they be retained after one o'clock." Nevertheless, it was decided that the check was paid under such a mistake of fact that the paying bank could recover of the other if the latter had not changed its position between one o'clock and the time when the check was returned.

(b) *Preston v. Canadian Bank*.<sup>2</sup> Although the clearing house regulation did not bar a recovery in that case, a more

<sup>1</sup> 139 Mass. 513.

<sup>2</sup> 23 Fed. Rep. 179.



defensive nature has been given to it in federal practice. Thus C. deposited collateral securities with P. K. & Co., who were bankers and members of the Chicago clearing house, they agreeing that he might draw checks within ten per cent. of the value of the securities. On the 5th of August C. drew his check for \$4000, which was deposited with the defendant bank (a member also of the clearing house), to his credit, and which went into the exchanges for collection through the clearing house on the morning of the next day. By its rules each member was required to pay its balances to the clearing house by twelve o'clock, and any check which was found not to be good when sent from the clearing house to the drawee bank was to be returned to the bank which collected it through the clearing house by half-past one o'clock of the same day. When C.'s check came from the clearing house into P. K. & Co.'s bank, his account was examined and the collaterals were deemed sufficient to pay that check and others that had been drawn and they were handed to the book-keeper to be charged to his account. At forty-two minutes past one, P. K. & Co. having heard that C. had failed, they made a second examination of his account and found that a mistake had been made; the check was immediately sent to the defendant bank and payment was demanded at fifteen minutes before two o'clock which was refused. They then began a suit against the bank to recover which was founded on payment by mistake, but failed to recover.<sup>1</sup>

(c) *Amount that may be recovered.* With respect to the amount that may be recovered where a check has been paid through the clearing house by a mistake of fact caused by

<sup>1</sup> A., the holder of a bank check drawn by B. on C., presented it on the day of its date at the clearing house and after adjusting the accounts between the various banks (his own among the number) received in settlement the clearing house manager's warrant on C. The next day A. having presented the warrant to C. who refused payment the original check was obtained from the clearing house, presented to C., dishonored, protested, and notice thereof given to B. He was holden for the amount, *Merchants' Nat. Bank v. Procter*, 1 Cin. Sup. Ct. R. 1.

the drawer's fraud, it is the difference between the amount of the check and the amount which the maker was entitled to draw ; and if there be not enough money on deposit to pay the check in full, the ordinary custom to return the check does not affect the question of recovery.<sup>1</sup>

§ 424. **Payment of notes through clearing house.** (a) *National Exchange Bank v. National Bank.*<sup>2</sup> Sometimes notes have been paid through the clearing house, and the applicability of its regulations to them has received judicial construction. By the rules of the Boston bank clearing house a time before noon was fixed for making exchanges there; and another time between twelve and one for paying balances. The practice was to make exchanges and payments by the tickets accompanying the vouchers presented for exchange, and not from an examination of the vouchers themselves in detail. The rules also provided that errors in the exchanges should be adjusted between the banks; and that, whenever checks which were not good should be sent through the clearing house, the banks receiving them should return them to the sender as soon as it should be found that they were not good, "and in no case shall they be retained after one o'clock." In the absence of evidence of a uniform custom among the banks which were members of the clearing house to treat notes the same as checks, it was decided that the sending of a note through the clearing house to a bank where it was payable was not a formal demand for immediate payment during business hours, but was equivalent to leaving the note there for collection from the maker on or before the close of banking hours; and that the payment of it at the clearing house was provisional only, which became complete when the note was paid in the usual and ordinary course of business, and, if not so paid, the payment at the clearing house was to be treated as a payment made under mistake of fact, to the same extent and subject to the same right of

<sup>1</sup> Merchants' Nat. Bank v. National Bank, 139 Mass. 513.

<sup>2</sup> 132 Mass. 147.

reclamation, although the note was retained after one o'clock, as if it had been without the intervention of the clearing house. Even if the bank at which the note was payable had funds of the maker of the note on deposit, the retention of the note until after one o'clock did not amount to payment, in the absence of evidence that the maker had authorized the bank to pay his notes out of his money on deposit.

(b) *Manufacturers' National Bank v. Thompson*.<sup>1</sup> In another case against the indorser of a promissory note payable at the plaintiff bank and discounted by another banking institution, it appeared that when the note became due the bank which had discounted it charged it to the other and sent it through the clearing house for collection. The plaintiff's teller, supposing that the maker had sufficient funds, stamped the word "paid" on the face of the note, but the mistake was soon discovered, and before the close of banking hours on the same day the other bank and indorser were notified of its non-payment, and the note was duly protested. The dispute between the banks concerning the effect of the clearing house rules was ended by the one paying the amount to the other without waiving its legal rights, while the bank that was paid disclaimed all title or interest in the note. The judge who tried the case found that the note was stamped as paid by mistake, that the money paid by the plaintiff to the other bank was not intended to pay, and did not pay the note; and that the plaintiff had sufficient title and ownership to bring the action. This decision was sustained by the higher court, that body also holding, that the defendant could not avail himself of the rules of the clearing house, to which he was not a party, as a defence.

§ 425. **Liability of clearing house.** When is the clearing house itself liable for non-performance of its duties? The defendant bank had a department for the general clearing of contracts between its customers who were engaged in the purchase and sale of gold. This was known as the clearing

<sup>1</sup> 129 Mass. 438.

house. Clearances were made each day by means of statements furnished by the dealers to the defendant of purchases and sales made by them, the defendant acting simply as a mutual agent for the parties. On an occasion when many members of the clearing house had failed to perform their contracts and when there was great confusion in regard to them, O. & Co., the plaintiff's assignor, presented two statements, one in the morning, and one in the afternoon. In the first was an item of a transaction between O. & Co., and a firm which had failed on the morning of that day. It was not usual to present more than one statement during the same day. When O. & Co. called on the defendant for the balance that appeared to be due by the statements, they were advised by its president that owing to the confusion in business he could not tell how the statements stood, and that he would only pay approximate balances, reserving a margin to secure the clearing bank against failures. The defendant accordingly paid \$30,000 on the second statement, leaving \$10,000 unpaid thereon, and paid nothing on the first. In an action to recover the balances appearing by the statements, the court held that the plaintiff must first show a clearance or settlement by the defendant of the statements and that a balance had been struck in favor of O. & Co.; that the statements were to be considered as only one statement, but that if considered separately there were no clearances of either which bound the defendant, and consequently that the plaintiff could not recover.<sup>1</sup>

§ 426. **Legal relations of banks when the checks of a non-member are cleared by a member.** A bank, instead of becoming a member of a clearing house, sometimes has its checks regularly cleared by another bank that is a member. In the following case the M. & M. Bank was a member of the New York bank clearing house and also an agent there for the plaintiff. It received from the latter on different days several forged checks taken on deposit from a forger. The M. & M.

<sup>1</sup> National City Bank v. New York Gold Ex. Bank, 101 N. Y. 595.

Bank credited the checks to the plaintiff and sent them to the clearing house, where it in turn was credited, and the defendant, the drawee, another member of the clearing house, was charged with them. The defendant without noticing the private mark understood between them, charged the checks as received from the clearing house to the supposed drawers. On receiving the last check, several days after the receipt of the others, the defendant discovered the forgery, and on the same day tendered the checks and demanded payment of them from the M. & M. Bank, which referred the matter to the plaintiff. The plaintiff had meanwhile paid the forger's drafts to the amount of the checks deposited, and refused to pay. The M. & M. Bank then gave the defendant its own check for the last of the forged checks, and the defendant sent the remaining forged checks with the M. & M. Bank's check through the clearing house to the M. & M. Bank. The latter complying with the clearing house rules, paid them all, and charged the amounts to the plaintiff's account, and sent it the four forged checks. The plaintiff retained the checks and tendered them the next day to the defendant and demanded payment but was refused. Twenty days afterward the plaintiff sent them by its agent, the M. & M. Bank, through the clearing house to the defendant, which paid them and immediately returned them through the clearing house to the M. & M. Bank, with notice that if they were sent back through the clearing house it would discontinue its exchanges with the M. & M. Bank. The latter bank returned the checks and charged them to the plaintiff. The plaintiff, as assignee of the M. & M. Bank, sued for the amount of the checks. It was held, first, that the M. & M. Bank had waived its right, if any, to insist on the acts of the defendant as payment of a forged check by the drawee, and had affirmed the acts of the defendant in obtaining repayment; second, that the waiver was not void for coercion, for having received the checks and passed them to the plaintiff's credit in its ordinary account, the M. & M. Bank had become actual owner of the checks and was rightly treated as principal; third,

that if not rightly so treated it could not, as agent of the plaintiff, refund to the defendant without actual authority; fourth, that the plaintiff having given authority to the M. & M. Bank to act for it under the clearing house rules, which required it to act as principal, the plaintiff was bound as to third parties by the acts of the M. & M. Bank.<sup>1</sup>

<sup>1</sup> *Stuyvesant Bank v. National Mechanics' Bank Association*, 7 Lans. 197.

"Country bankers who use the country clearing house have correspondents in London whose name is printed on their checks. A check drawn on a country bank and paid to a second country bank situate at a distance from the first, is sent to the London correspondent of the second bank, who presents it at the country clearing house, to the London correspondent of the first bank. The London correspondent does not mark the check at once, or give credit for it, but transmits it by the next post to his country banker, who should advise the London correspondent by return of post to debit his account with the same, when the London correspondent gives a draft for the amount to the banker from whom he received the check," Walker's Treatise on Banking Law, p. 131; *Hare v. Henty*, 30 L. J., C. P., 302; *Bailey v. Bodenham*, 33 Id. 252; see also *Prideaux v. Criddle*, L. R., 4 Q. B., 455; *Pollard v. The Bank of England*, L. R., 6 Q. B., 623.

"A large portion of the checks which are paid into banks in London by customers in order that the amounts may be carried to their accounts as money, is never presented by such bankers as bearers, at the banking houses on which they are drawn; but that, instead, is established the practice of placing them in the drawers at the clearing house belonging to the latter banks. In other words, they are presented to the clerks of the latter, who attend at the clearing house, and such presentment has been held to be sufficient," Grant's Law of Bankers (4th ed.), p. 54; *Reynolds v. Chettle*, 2 Camp. 596. "If a check be received by the banker too late for presentment at the clearing house, it is the custom to send it direct to the bank upon which it is drawn, and if it is to be dishonored it is initialed or marked, priority in payment being given to it on the following day. The only effect of this marking is that it may perhaps be considered as a binding representation between bankers that the instrument will be paid," 1 Hutchinson's Practice of Banking, p. 382; *Boddington v. Schlencker*, 4 Barn. & Ad. 752; *Robson v. Bennett*, 2 Taunt. 389.

## CHAPTER XXI.

## PUBLIC DEPOSITS.

§ 427. **Effect of adding official title.** When a public officer deposits money on an account which is kept in his own name with his official title, as "Samuel Swartwout, Collector," this is a private deposit unless there be evidence to the contrary.<sup>1</sup> In a well considered Missouri case<sup>2</sup> founded on a dividend draft drawn by the United States Comptroller and payable to the order of "Herman Rechtien, County School Treasurer," Lewis, P. J., said: "The fact that a man is county treasurer furnishes no presumption that money deposited by him in a bank is the property of the county. The bank in receiving the deposit becomes debtor to him as an individual. This relation between the parties is not changed by the addition of 'county treasurer' to his name in the bank account books or in the checks drawn by him. It has been frequently held that such additions impart no notice, that the fund is held in a fiduciary capacity and that they have no legal significance beyond a description of the person. Thus 'Herman Rechtien, County Treasurer,' may be a form intended only to show that the person is not some other having the same name who is not county treasurer. Every legal presumption, as between the parties, is in favor of the personal ownership of the fund by the depositor; and, if nothing more appears, the bank must be guided in all its transactions by these presumptions."<sup>3</sup>

<sup>1</sup> *Swartwout v. Mechanics' Bank*, 5 Denio, 555.

<sup>2</sup> *Eyerman v. Second Nat. Bank*, 13 Mo. App. 289.

<sup>3</sup> "The principle is the same that was recognized in *Powell v. Morrison*, 35 Mo. 244, though with a different application. There a promissory note given in the purchase of lands sold in partition was made payable to 'the order of James Costello, sheriff of St. Louis County.' The payee sold the note before maturity and one of the partitioners sued the transferee for his share of the partition proceeds contained in the note. It was held that the words

In this case the court decided that "while the *descriptio personæ* was insufficient of itself to impart notice to the bank that the dividend draft in controversy (which Rechten having transferred to the Second National Bank it had collected and appropriated) represented a deposit of money belonging to the city and county, yet when considered in connection with the facts that Rechten had had frequent consultations with the directors touching his financial relations to the city and county, particularly with reference to deposits made by him officially in another bank, a part of which was represented by the draft in question, a proper showing at least was made for the jury to determine whether the bank had taken the draft as Rechten's or not." Moreover, the conclusion thus reached was sustained by the Supreme Court for the reasons contained in the opinion from which we have quoted.<sup>1</sup>

**§ 428. Personally liable if deposit be on private account.** If an official deposit public money on his private account he is liable for the amount should the depository fail. Thus a justice of the peace who received money in satisfaction of a judgment deposited the same in a bank to his private account. The bank having failed, the justice was declared to be liable to the judgment creditor for the amount.<sup>2</sup>

"sheriff of St. Louis County" imparted no notice to the indorsee of the trust attached, but were merely descriptive of the payee, and the plaintiff could not recover. A like conclusion was reached in *Thornton v. Rankin*, 19 Mo. 193, where, upon a sale of real estate belonging to certain minors, a note was made payable to their guardian, by the description 'Isaac J. Cooper, guardian, etc.,' and by him transferred to an indorsee without other notice of the facts. So, in *Fletcher v. Schaumburg*, 41 Mo. 501, it was held that a distributee in partition could not set up her distributive interest against her note given at the sale and indorsed by the sheriff, with his official addition to an innocent purchaser. It must be observed that in each of these cases the decision was founded squarely on the propositions that the *descriptio personæ* imparted no notice of the existing trust, and that the indorsees had in fact no notice thereof from any other source. They were entitled therefore to be treated as if no such trust existed." Lewis, P. J., *supra*.

<sup>1</sup> 84 Mo. 408.

<sup>2</sup> *Shaw v. Bauman*, 34 Ohio St. 25; *Ringo v. Field*, 1 Eng. (Ark.) 43.



§ 429. **Deposit is general unless specially deposited.** When money is deposited by the clerk of a court under its order which is entered like other general deposits and mingled with the funds of the bank, it is a general deposit, and if the institution fail, the clerk must share *pro rata* with other general depositors.<sup>1</sup>

§ 430. **Belongs to successor in office.** When money is deposited by a board of persons in their official relation who are superseded in office by other persons, the deposit is subject to the order of the new board.<sup>2</sup> By way of further illustration when one city comptroller of New York succeeds another the latter has the right to designate the banks in which the money should be deposited.<sup>3</sup>

(a) *Duty of bank when demanded by opposing claimants.* And when both boards claim the deposit the bank may bring a bill of interpleader to have the court determine who should be paid. Said Judge Van Vorst in applying this principle: "It is true that a bank or other agent would not be justified in commencing an action of interpleader upon any and every claim made by others to moneys deposited with it by a dealer. . . It may be conceded that actions of this character are not to be encouraged and should be dismissed if there exist any means of adjusting the claims with safety to the holder of the funds.<sup>4</sup> To sustain such action it must appear that the plaintiff has good reason to believe that the adverse claim is well founded, and that unless the court protects him he will be exposed to loss."<sup>5</sup>

§ 431. **Should not pay to bankrupt official.** A bank should not pay money belonging to a county and kept in the name

<sup>1</sup> *Otis v. Gross*, 96 Ill. 612.

<sup>2</sup> *Carman v. Franklin Bank*, 61 Md. 467.

<sup>3</sup> *Lewis v. Park Bank*, 42 N. Y. 463; *Aff. 2 Daly*, 85.

<sup>4</sup> *Bedell v. Hoffman*, 2 Paige, 199.

<sup>5</sup> *German Exchange Bank v. Commissioners*, 6 Abb. N. C. 394, p. 397; see *Marvin v. Ellwood*, 11 Paige, 365; *Balchen v. Crawford*, 1 Sand. Ch. 380; *Bell v. Hunt*, 3 Barb. Ch. 391; *Bleeker v. Graham*, 2 Edw. Ch. 647; *Badeau v. Tylee*, 1 Sand. Ch. 270.

of the county treasurer in his official capacity to his assignee in the event of his becoming bankrupt.<sup>1</sup>

§ 432. **When bank has knowledge of wrongful conduct of public depositor.** Sometimes the law will regard depositories as having knowledge of the wrongful acts of public officials in drawing public money for private purposes, when in truth they have not such knowledge. Thus, the treasurer of a town made several notes in his official capacity without authority to do so, which were discounted by a bank and the avails were placed to his credit as treasurer. Public funds were deposited by him from time to time in the same account, and the notes above mentioned, after several renewals, were paid by his checks drawn as treasurer. He afterward became a defaulter. The money thus drawn by him would have made good his defalcation. The bank supposed that he had authority to make the notes discounted, and that the proceeds were used for the benefit of the town, but in truth a large amount of the money drawn out on his checks as treasurer was used for private purposes. His integrity at that time was unquestioned. Yet the court held that the bank must be considered as having knowledge that he had no authority to make the notes mentioned, that they must therefore be treated as his private notes and the loans as personal, and further, that when he drew out the town money to pay the notes, he did what the bank must have known he had no right to do, and that it could not consequently retain the money against the town's demand.<sup>2</sup> In another case the trustee of a town sold its bonds and deposited the money in a bank to the credit of himself, "J. C. Wilson, Trustee." The money was applied on a debt of Wilson due to the bank. The court held that it had no right to apply the money in this manner.<sup>3</sup>

§ 433. **Authority to pay public money.** Twenty-five persons raised money for the purpose of expending it in furnishing a

<sup>1</sup> Board of Supervisors v. Bank of Havana, 5 Hun, 649.

<sup>2</sup> Town of East Hartford v. American Nat. Bank, 49 Conn. 539.

<sup>3</sup> Bundy v. Town of Monticello, 84 Ind. 119. See § 40 c.

hall in a certain building. They chose a committee and also a treasurer, and through him in his official capacity deposited the money in a bank. The committee having furnished a hall in another building, the treasurer refused to pay the deposit when demanded by that body. A majority of the twenty-five approved the action of the committee, and appointed another treasurer to whom the bank paid the money. The treasurer first appointed then sued to recover the money on the ground that it had been diverted from its rightful purpose. But the court said that "the disposition of the fund was given to the executive committee, and the appropriation of the fund by that committee, acting with unanimity, as fairly appears, was sufficient authority to warrant payment by the bank, and the payment was a discharge."<sup>1</sup>

§ 434. **Liability of public officer for money.** In South Carolina an interesting case has been decided on this subject. A commissioner in 1863 and 1864 deposited his official moneys in a branch bank of the State, where they remained until the failure of the bank at the close of the war. He was declared to be not liable for any of the money thus lost. On retiring from office in 1866, he reported an aggregate balance due from estates larger than the amount to his credit on his bank-book, nor did he account for the excess. After his death, in 1874, an action was brought against his administrator, and all his creditors were required to establish their claims, the amount of which proved to be less than the amount to his credit in the bank. The court assumed that unrepresented claims were satisfied, and that there was no unpaid balance against the commissioner, except what was covered by the deposit in the bank. Finally, the court decided that when he turned over his office, bank-book, etc., to his successor, claiming to withhold nothing, the Statute of Limitations then began to run in his favor against persons having funds in his hands, as the provision of the law which imposed on him the duty of making a complete transfer was

<sup>1</sup> *Tay v. Concord Savings Bank*, 60 N. H. 277.

equivalent to a demand. On this point the court remarked that "The law is too well settled to make any reference to authority necessary, that when a trustee does an act which purports to be a termination of his trust, it gives currency to the statute from the time of such an act. This act may be simply an act done in a public office, in which, by law, he must render an account of his trust. When the act purports to be a complete termination of the trust he henceforth holds adversely, and, at the end of the statutory period, all further account is barred. Trustees are not the only persons who are entitled to the benefit of the statute, and, therefore, it is not important to determine whether the commissioner in equity was or was not a trustee. He was, however, a public officer, to whom was entrusted, by law, the collection and custody of the money of others, and the care and custody of their bonds and other property."<sup>1</sup>

<sup>1</sup> State *ex rel.* Van Wyck v. Norris, 15 S. Car. 241, p. 257.

BOOK III.

COLLECTIONS.



## CHAPTER I.

### COLLECTION OF NOTES AND CHECKS.

§ 435. **Kinds of collections and collecting agencies.** We shall now state the principles of law which have been applied to banks when acting as agents in collecting notes, checks and similar instruments. To understand these clearly several distinctions should be kept in sight. The first is that a "collecting agency" is not the same thing as a bank; and consequently different principles have sometimes been applied to such an association than to a bank in making collections. Again, the instruments left for collection are of four kinds, those left by (a) depositors and by (b) non-depositors to be collected by the bank itself, and those left by (c) depositors and by (d) non-depositors with the bank to be sent by it to a sub-agent for collection. The reasons for applying different principles on some occasions to these four kinds of instruments will appear before concluding this and the following chapter.

§ 436. **Is collecting bank the owner?** (a) *It is when advances have been made.* As a bank is the agent of the remitter, he must bear the loss resulting from omissions or defalcations of the agent in the line of his duty.<sup>1</sup> As soon as the note or other instrument is received, the correspondent is usually credited for the amount. This, however, is provisional only in anticipation of prompt payment and the crediting can be cancelled if the note be dishonored.<sup>2</sup> But suppose the note is credited as cash, and the sender draws against the amount, does it belong to him? The courts have answered that the

<sup>1</sup> Moore v. Meyer, 57 Ala. 20.

<sup>2</sup> Trinidad Nat. Bank v. Denver Nat. Bank, 4 Dill, 290.

title is transferred to the bank, of which it cannot be divested, notwithstanding its right to charge the note back in the event of non-payment.<sup>1</sup> Said Judge Gardiner: "It would be a singular mode of transacting business to give credit for securities and allow the funds thus constituted to be drawn against, and the drawer at the same time to retain the entire legal or equitable interest in the securities of which the fund was composed."<sup>2</sup>

(b) *Cody v. City National Bank.*<sup>3</sup> A firm had been in the habit of indorsing in blank the drafts or checks which were drawn to their order and depositing them in a local bank as money for which they could draw. A check was thus left without instructions and forwarded to the defendant bank for collection. At the same time the local bank asked the other to give credit therefor and to remit in currency for a considerable amount; both things were done. Indeed, after crediting the sender and making a remittance as requested, only a small balance was due to the former. The second bank forwarded the check to Chicago for collection, but before it had been collected the local bank failed. The depositor then telegraphed the Chicago bank to stop payment. The order was regarded and the check was returned to the defendant bank. The depositor claimed to be the owner of the check, and so did the defendant bank which had remitted on the faith of it to the failed institution. The court decided against the depositor.

(c) *Bank is not owner unless it has advanced on specific note.* A bank though is not the owner until it has advanced the amount or has become responsible for the same. The ownership previous to collection can only be established by a contract expressly proved or inferred from a course of dealing. Such an inference does not flow from the fact that a customer

<sup>1</sup> *Flannery v. Coates*, 80 Mo. 444; *Ayres v. Farmers & Merchants' Bank*, 79 Id. 421; *Bullene v. Coates*, Id. 426.

<sup>2</sup> *Clark v. Merchants' Bank*, 2 N. Y. 380, p. 385; see *Commercial Bank v. Marine Bank*, 3 Keyes, 337, p. 341.

<sup>3</sup> 55 Mich. 379.



may be a large depositor of money and bills, and constantly drawing drafts against his remittances under an arrangement by which he is allowed interest on his average balances.<sup>1</sup> Says Judge Folger: "If the property in the note, without purchase or advance, is to vest in an agent or correspondent for collection, he must become absolutely responsible to his principal for the amount. An obligation to become thus responsible can be established only by a contract to be expressly proven or inferred from an unequivocal course of dealing."<sup>2</sup> And advances on notes in anticipation of their collection, though not of any particular note, will not transfer their ownership to the collecting bank.<sup>3</sup>

§ 437. **Bank is not collecting agent by making note payable there.** Nor does a bank become an agent for collecting a note by making it payable there. No power, authority, or duty is conferred on the association by drawing it in this manner.<sup>4</sup> When such a note is thus left for collection the bank becomes the agent of the payee to receive payment;<sup>5</sup> when it is not left, whatever the bank receives from the maker to be applied thereon is received, not as the agent of the payee but of the maker.<sup>6</sup>

§ 438. **Bank is real holder for notifying purposes.** A bank which receives and indorses a note for collection, although a

<sup>1</sup> Scott v. Ocean Bank, 23 N. Y. 289.

<sup>2</sup> Dickerson v. Watson, 47 Id. 439, p. 442. A bank does not become the *bona fide* holder of a draft remitted by another bank for collection unless it makes subsequent advances thereon or transmits the proceeds, McBride v. Farmers' Bank of Salem, Ohio, 26 Id. 450; Aff. 25 Barb. 657; Arnold v. Clark, 1 Sand. 491; West v. American Ex. Bank, 44 Barb. 175. A collecting bank is responsible directly to the owner of the paper, it may discharge itself by an actual payment to its correspondent, but not passing the amount to its credit in general account, Echarte v. Clark, 2 Edm. Sel. Ca. 445.

<sup>3</sup> Dickerson v. Watson, 47 N. Y. 439.

<sup>4</sup> Hills v. Place, 48 Id.. 520.

<sup>5</sup> Ward v. Smith, 7 Wall. 447.

<sup>6</sup> Id. When the real owner of a note delivers it to a bank and authorizes it to collect the proceeds and to apply the same toward payment of his indebtedness to the bank, and it does not receive or credit the note as collateral security, it is merely the agent of such owner, Prescott v. Leonard, 32 Kansas, 142.

mere agent, is considered the real holder for the purpose of receiving and transmitting notices respecting its non-payment.<sup>1</sup> And when a note is indorsed to a cashier and given by him to a notary for protest, these facts are sufficient to show that it was either negotiated to the bank or left there for collection.<sup>2</sup>

§ 439. **Indorsement for collection does not render bank liable as indorser.** But an indorsement for collection does not pass the title or render the indorser liable in that capacity.<sup>3</sup> Nor can parol evidence be introduced to show that a restrictive indorsement, for example an indorsement "for collection," was an absolute one.<sup>4</sup>

(a) *Relation of bank to owner and maker of note thus indorsed.* As an indorsement of a note for collection passes no title to the indorsee on his own account, several consequences follow. For example, the maker of a note left money with his bankers directing them to pay it, and by so doing made them his agents for that purpose. They gave him credit for the money on their books, and sent for and received the note from the holder, which was indorsed to their order for collection. They did not remit the money, and let the note remain uncanceled among their collection papers, and after a time failed. The note was held to be not paid. It had been sent to them for a specific purpose, and no title to it had even passed to them on their own account. They did nothing as agents of the holder.<sup>5</sup>

(b) *Payment to another person is no discharge.* Again, when a note is thus indorsed, payment to any other party than the indorsee is no discharge. Thus in *Barnet v. Ringgold*,<sup>6</sup> the payees of the note in suit indorsed it to a bank "for collection," but by mistake it was sent to the maker, who thus obtained possession without payment. He contended that he

<sup>1</sup> *Ogden v. Dobbin*, 2 Hall, 112; *Mead v. Engs*, 5 Cow. 303; *Warren v. Gilman*, 17 Me. 360; *Freemau's Bank v. Perkins*, 18 Id. 292.

<sup>2</sup> *Burnham v. Webster*, 19 Id. 232.

<sup>3</sup> *Broun v. Hull*, 33 Gratt. 23.

<sup>4</sup> *Third Nat. Bank v. Clark*, 23 Minn. 263.

<sup>5</sup> *Sutherland v. First Nat. Bank*, 31 Mich. 230.

<sup>6</sup> 80 Ky. 289.

received it from an unknown person to whom he paid it. The court, however, declared that the indorsement was a special authority to the bank authorizing it to make the collection of the note, and that the bank or its agents authorized to act for it were the proper parties to whom the payment should have been made, and by whom the note could have been legally presented for payment, subject to the right of interference of the owners by revocation or otherwise. "Had the supposed holder to whom the maker contends he paid the note produced it indorsed in blank, or had the note been payable to bearer, either would have been sufficient evidence of his right to present it and receive the payment. But the payment by the maker to an unknown holder or stranger, who had no right to collect it, either as agent in fact or *bona fide* owner, in the face of the special indorsement to the bank for collection by the holders, was made at his own risk, as the possession with such an indorsement was notice to him that none but the bank or its agents, or the holders and their agents, were authorized to present the note or receive the money thereon."

(c) *Can bank maintain suit to recover on such a note.* An indorsement on a note, "Pay to A. B., or order, for collection," and signed by the payee or owner of the note, merely makes the indorsee agent for the indorser to collect it, but does not vest in him a title on which he can maintain a suit.<sup>1</sup> This, however, is a statutory regulation, and, of course, prevails only in the States which have enacted it. At common law, as said by Chief Justice Gilfillan, "the beneficial owner of a negotiable bill or note, payable to bearer or indorsed in blank, might institute suit on it in the name of any one who would allow his name to be used for that purpose, and that unless the maker had a defence to the note, good against the real owner, he could not be permitted to show that the plaintiff was not the real party in interest."<sup>2</sup>

<sup>1</sup> Rock County Nat. Bank v. Hollister, 21 Minn. 385.

<sup>2</sup> Morton v. Rogers, 14 Wend. 575; Lovell v. Evertson, 11 Johns. 52; Conroy v. Warren, 3 Johns. Cas. 259. If a note indorsed in blank be put into

(d) *Indorsement in invoices accompanying bills of lading.* Nor is an indorsement "for collection" by a bank on invoices that accompany bills of lading attached to drafts, a guaranty of their genuineness. Says Judge Field in *Goetz v. Bank of Kansas City*:<sup>1</sup> "A bank in discounting commercial paper does not guarantee the genuineness of a document attached to it as collateral security. Bills of lading attached to drafts drawn, as in the present case, are merely security for the payment of the drafts. The indorsement by the bank on the invoices accompanying some of the bills 'for collection,' created no responsibility on the part of the bank; it implied no guarantee that the bills of lading were genuine; it imported nothing more than that the goods which the bills of lading stated had been shipped, were to be held for the payment of the drafts, if the drafts were not paid by the drawees, and that the bank transferred them only for that purpose. If the drafts should be paid the drawees were to take the goods. To hold such indorsement to be a warranty, would create great embarrassment in the use of bills of lading as collateral to commercial paper, against which they are drawn."

§ 440. **Ownership can be changed by agreement.** Of course, the ownership of a note sent for collection may be changed by special agreement. Thus a New York bank received from Briggs for collection, a check drawn on a bank in New Jersey, and sent it by mail to the drawee, which for a long period had been its collecting agent in that State. The drawee on receiving the check charged it to the drawer and credited the New York bank with the amount. The next day the New Jersey bank failed, and Briggs then brought an action against the New York bank to recover the amount. The court decided

bank for collection and be not withdrawn after it is protested, the bank may support an action thereon in its own name, *Sterling v. Marietta & Susquehanna Trad. Co.*, 11 Serg. & Raw. 179.

<sup>1</sup> 7 Sup. Ct. Rep. 318 (1887); *Robinson v. Reynolds*, 1 G. & D. 526; *Craig v. Sibbett*, 15 Pa. 238; *Thiedemann v. Goldschmidt*, 1 De Gex, F. & J. 4; *Hunter v. Wilson*, 19 L. J., Ex. 8; *Leather v. Simpson*, L. R., 11 Eq. 398. See § 205.

that the drawee had a right, under an agreement existing between the two institutions, to discharge the drawer and substitute itself as debtor, which it did, and that the New York bank "must be regarded as having accepted the responsibility of the drawee upon its credit in the collection account as payment of the check," and was consequently liable for the amount.<sup>1</sup>

§ 441. **Must use reasonable skill and diligence in collecting.** A bank must use reasonable skill in making the collection, and to that end must make a seasonable demand on the promisor; and, if the note be dishonored, give due notice to the indorsers in order to preserve the security of the owner.<sup>2</sup> And "any agent," in the language of Judge Selden,<sup>3</sup> "whether it be a bank or an individual, receiving a note or bill from the holder for collection is responsible for any loss which the holder may sustain on account of any neglect in presenting it or in giving notice of its dishonor." He also added that "it is the duty of an agent who receives for collection a bill of exchange, payable at some future time, to use due diligence in presenting the same for acceptance, and if he fail to do so, or fail to give notice in case acceptance is refused, he will be liable."<sup>4</sup> The question, therefore, to be answered here is,

<sup>1</sup> *Briggs v. Central Nat. Bank*, 89 N. Y. 182.

<sup>2</sup> *Fabens v. Mercantile Bank*, 23 Pick. 330.

<sup>3</sup> *Walker v. Bank*, 9 N. Y. 582, p. 584; *Huff v. Langdon*, 2 Disney, 63.

<sup>4</sup> In *Exchange Nat. Bank v. Third Nat. Bank*, 112 U. S., p. 290, Judge Blatchford said: "An agent receiving for collection, before maturity, a draft payable on a particular day after date, is held to due diligence in making presentment for acceptance, and if chargeable with negligence therein, is liable to the owner for all damages he has sustained by such negligence, *Allen v. Suydam*, 20 Wend. 321; *Walker v. Bank*, 9 N. Y. 582. The drawer or indorser of such a draft is, indeed, not discharged by the neglect of the holder to present it for acceptance before it becomes due, *Bank v. Triplett*, 1 Pet. 25; *Townsley v. Sumrall*, 2 Id. 170. But if the draft is presented for acceptance and dishonored before it becomes due, notice of such dishonor must be given to the drawer or indorser, or he will be discharged, 3 Kent's Com. 82; *Bank v. Triplett*, 1 Pet. 25; *Allen v. Suydam*, 20 Wend. 321; *Walker v. Bank*, 9 N. Y. 582; *Goodall v. Dolley*, 1 Term 712; *Bayley on Bills*, 2d Am. ed. 213. Moreover, the owner of a draft payable on a day certain, though not bound

what does reasonable skill and diligence require of a collecting agent; in other words, what omission or neglect renders the collecting agent liable to the owner of the note or other instrument sent for collection?

**First.** (a) *Must follow instructions.* *Central Georgia Bank v. Cleveland National Bank.*<sup>1</sup> When a bank receives instructions concerning the collection of a note it must follow them or be liable for the consequences. Thus, a bank, having taken a solvent bill for collection, before it matured, was instructed to permit a renewal for a further term of credit, on condition that a solvent indorser should be given on the new instrument. The bank suffered the renewal to be made without such indorser, surrendering the former bill to the acceptor, and reporting that a renewal had taken place in conformity with instructions. The holder was injured in consequence of the subsequent insolvency of the acceptor during the extended term of credit, and the bank was holden for the damage sustained.<sup>2</sup>

(b) *Merchants and Manufacturers' National Bank v. Stafford National Bank.*<sup>3</sup> A firm in Michigan left for collection with a

to present it for acceptance in order to hold the drawer and indorser, has an interest in having it presented for acceptance without delay, for it is only by accepting it that the drawee becomes bound to pay it, and, on the dishonor of the draft by non-acceptance and due protest and notice, the owner has a right of action at once against the drawer and indorser, without waiting for the maturity of the draft; and his agent, to collect the draft is bound to do what a prudent principal would do, 3 Kent's Com. 94; *Robinson v. Ames*, 20 Johns. 146; *Lenox v. Cook*, 8 Mass. 460; *Ballingalls v. Gloster*, 3 East, 481; *Whitehead v. Walker*, 10 Mees. & Wels. 696; *Walker v. Bank*, 9 N. Y. 582." See also *Mount v. First Nat. Bank*, 37 Iowa, 457.

<sup>1</sup> 59 Ga. 667.

<sup>2</sup> A bank having for collection a draft by L. on C., received money in part payment and a sight draft and a ten days' sight draft on B. in settlement of L.'s draft on C. B. paid one draft and accepted the other at ten days. On maturity the bank presented it to B. for payment, which was refused, but the bank did not protest it so as to charge the drawer. This was negligence and the bank became liable for the amount, *Capitol State Bank v. Lane*, 52 Miss. 677.

<sup>3</sup> U. S. Dis. Ct., 44 Conn. 564.

bank in that State a sight draft for \$500 on J. C., treasurer of a corporation in Connecticut, which sent the same to the defendant bank with directions to "return at once without protest if not paid." It presented the draft to the drawee, who replied that he would look up his account with the drawers and inform the cashier with regard to payment. The drawers had also written to J. C. that such a draft had been forwarded, and he wrote in reply: "The \$500 draft has been received and paid. Don't draw any more." On the receipt of this letter the drawers showed it to the Michigan bank, which, believing that the draft had been duly paid, also paid the drawers \$500. J. C., the drawee, was also the president of the defendant bank, and this fact was known to the one in Michigan. Several days later the cashier returned the draft unpaid, which was his first information to the Michigan bank with regard to the matter. It then demanded repayment of the drawers, which was refused. They were solvent, but had no visible property, and the claim could not have been collected without much difficulty. It was held, first, that the defendant bank, as agent of the other for the collection of the draft, had been guilty of negligence in not obtaining payment of the draft or returning it at once to the Michigan bank. Second, that although the Michigan bank paid the money to the drawers on the statement of the drawee to the drawers that the draft had been paid, yet, as it would have been saved from loss if the defendant bank had performed its duty, the defendant was liable for the actual damages resulting from its neglect. Third, that these damages were to be regarded as the whole amount paid by the plaintiff bank to the drawers, and that it had a right to recover this sum, although it had a right of action for the whole amount against them.

**Second.** *Must protest an improperly accepted draft.* The collecting agent is negligent if he omit to protest a draft that has been improperly accepted whereby the drawers and drawees are discharged. Thus a draft, which was drawn by the Empire Mills on "E. C. Hamilton, Esq., New York,"

was sent to a bank for presentment. The drawee wrote across the face of the draft, "Accepted, payable at Am. Ex. Bank, Empire Mills, by E. C. Hamilton, treas." As the acceptance bound neither the drawee nor the "Empire Mills," and the bank omitted to protest the draft, it was liable to the holder for the amount.<sup>1</sup>

**Third.** *Note must be presented where it is made payable for payment.* When a note is made payable at a particular place it must be presented there for payment. But when it is made payable at a bank and is put into the cashier's possession for collection, there is no necessity for making a specific demand. The legal requirements are fulfilled if the note is in the bank when it is due; in other words, is with the cashier who is ready to receive the money. The demand will suffice if the teller of the bank who presents the note inquires of the book-keeper whether a deposit has been made to pay it, and is informed that there are no funds to pay it. Moreover, the demand would be good, though the teller should act as clerk of the notary public who protests the note.<sup>2</sup>

**Fourth.** *Duty of bank when the note is to be collected in another place.* If a bank has a collection note against a person residing in another place, its duty consists in placing it with due diligence for collection or protest into the hands of a competent and responsible agent doing business at the residence of the maker.<sup>3</sup>

<sup>1</sup> Walker v. Bank, 9 N. Y. 582.

<sup>2</sup> Browning v. Andrews, 3 McLean, 576; Berkshire Bank v. Jones, 6 Mass. 524; State Bank v. Napier, 6 Humph. 270. Says Johnson, J., "In commercial places, usage has made banks the general repositories of the funds of individuals, and when one is told that he is to be paid money at a bank, he understands that the promisor will deposit funds there for that purpose, and if, upon inquiry, he ascertains that there are no funds there, he understands as distinctly that he is not to be paid. He has done, therefore, all that the implied undertaking on his part imposes when he makes a demand at the bank. This rule is too well settled to admit of any controversy." Bank v. Flagg, 1 Hill (S. C.), 177, p. 179; Saunderson v. Judge, 2 H. Black, 509.

<sup>3</sup> Stacy v. Dane County Bank, 12 Wis. 629.



**Fifth.** *Must keep the security for the note.* (a) *Woolen v. New York and Erie Bank.*<sup>1</sup> When must the collecting bank keep the security—the bill of lading or other thing—on the strength of which the draft to be collected is drawn? W., a banker at Indianapolis, sent a draft to a bank at Buffalo, drawn on B., who resided there, and also bills of lading for some lumber which C. had sold to B. The draft was for the purchase price which was discounted by W. on the security of the bills of lading as collateral. In a letter accompanying the draft and bills, W. stated that the draft was sent for collection and desired the proceeds to be transmitted. The draft was payable fifteen days after date, and was indorsed by M., and then by W., specially to the cashier of the bank “for collection.” By its terms the drawer, indorsers, and acceptors waived presentment for payment and notice of protest and non-payment. The bills of lading set forth C. as the shipper of the lumber, and were dated two or three days prior to the date of the draft, and were indorsed by C., M. and W. The draft was accepted by D. and the bank delivered the bills of lading to him. He failed, however, before its maturity. By ordinary course the lumber would reach Buffalo eight days before the maturity of the draft. W. brought a suit against the bank to recover the amount of it on the ground that the institution did wrong in delivering the bills of lading before collecting the draft. Judge Wallace said: “It is evident that the draft originated from the shipment of the lumber, was negotiated on the credit of that shipment, and that the parties to it intended that the defendant should deliver the bills of lading to the drawee upon his compliance with the conditions of the agreement under which the lumber was shipped. What those conditions were must be determined by the draft and bills of lading only, and must resolve themselves into one of two alternatives. Either the drawer had consigned the lumber on his own account to be sold for him

<sup>1</sup> 12 Blatchf. 359; *Lanfear v. Blossman*, 1 La. Ann. 148; see also *Mason v. Hunt*, 1 Doug. 297.

by the drawee, and drawn upon the latter for an advancement on the consignment, or the drawer had sold the lumber to the drawee, and drawn upon him for the purchase price. On the first supposition the drawee was under no obligation to accept the draft until he received the property consigned; on the second, the fact that the draft was payable fifteen days after date, indicated that the sale was on the credit of that time. If the sale was on credit the drawee was entitled to a delivery of the property, and to require him to pay for it on delivery would be to repudiate the agreement for credit. Upon either hypothesis the drawee was entitled to the property as the consideration of his acceptance of the draft. If such was his right evidently the drawer, indorser, and owners of the draft had no interest in the bills of lading except so far as they were security for the acceptance of the draft; and it was reasonable to infer that they were forwarded to the defendant to retain or return in case acceptance was refused." The bank, therefore, was declared to be not negligent in delivering the bills of lading to the acceptor of the draft.

(b) *National Bank v. City Bank*.<sup>1</sup> A., the owner of an elevator, bought through B., of Milwaukee, two cargoes of wheat and sent sight and time drafts in payment. A Milwaukee bank bought the drafts and received the bills of lading. These described B. as the shipper and that the grain was to be delivered at Oswego to the account of D., cashier of the Milwaukee bank, care of the City Bank of Oswego. The Milwaukee bank accordingly sent the drafts and bills of lading to the other with the instruction: "On payment of the drafts you will deliver the cargo to the order of A. If not paid please hold and advise by telegraph." The bank acknowledged their receipt, presented the sight drafts to A., who paid them and accepted the time draft. On the arrival of the wheat at Oswego the master of the vessel that carried it reported to the cashier of the City Bank, who indorsed

<sup>1</sup> 103 U. S. 668.

the bills of lading: "Deliver to the Corn Exchange Elevator for account of D., cashier Milwaukee, subject to order of the City Bank, Oswego." After the wheat had been thus delivered, A., the owner of the elevator as above mentioned, sold it. The City Bank in its account with the other made a charge in addition to the customary percentage for collecting and remitting the proceeds of the draft. Before the time draft became due, A. failed. In an action by the Milwaukee Bank against the other it was held, first, that the City Bank was its agent in transacting the business in question; and second, that whether it exercised reasonable care and diligence in the matter was a question of fact for the jury to decide. It may be added that the court thought that the City Bank was negligent. The instructions were not to deliver the wheat until the drafts were paid. The City Bank did deliver it on payment of the sight draft and before payment of the other, whereby the Milwaukee bank lost its security.

**Sixth.** *What is reasonable diligence in giving notice.* Generally it may be said that a bank acts with reasonable diligence after presenting a note and not receiving payment if it give notice by the regular course of mail to the indorser from whom it was received, so that he may transmit notice to his immediate indorser, who may take the same course toward the prior indorser. And if the indorsers in due season adopt the regular course of mail for transmitting notices from one to the other and by that means the route to the first indorser is made circuitous, diligence is not wanting on their part, and he cannot set up the manner of the giving of the notice and the delay occasioned by it as a defence.<sup>1</sup>

(a) *When indorsers live in the same town.* We may begin the inquiry by asking what does reasonable diligence require when the indorsers live in the town where the note is payable? This may be answered in the words of Judge Johnson.<sup>2</sup>

<sup>1</sup> Ogden v. Dobbin, 2 Hall, 112; Mead v. Engs, 5 Cow. 303; Tunno v. Lague, 2 Johns. Cas. 1; Haynes v. Birks, 3 Bos. & Pull. 599.

<sup>2</sup> Johnson v. Harth, 1 Bail. 482, p. 485.

“When a note is placed in bank for collection, if it is not paid when due, it is placed in the hands of a notary, whose duty it is to demand payment. If it is not paid within bank hours of the last day of grace, the notary, on the evening of that, or on the next day, gives notice to all the indorsers, if they reside in town, if out of town, then by the next mail, and it is not until after all this is done that he returns it to the bank, under protest, and notice to the holder is considered no part of his duty.” In one of the recent cases Judge Veazey remarked that in giving notice by mail “the general rule is that when the parties reside in the same city or town, the notice, verbal or written, must be personal, or written notice must be left at the dwelling house or place of business; and notice by mail will be insufficient unless its reception in due time is proved. But if the instrument is protested at a place different from the residence of the party who is sought to be notified, the mail may be used. And it has been held that it may be used by an indorser, who has received notice by mail, in sending notice to a previous party residing in the same town, provided the notice is re-deposited on the same day it was received, so that it may reach the previous party on the same day it would have been received by him if originally addressed to him and had not been withdrawn from the post-office and remailed.”<sup>1</sup>

(b) *Custom.* A bank, by custom or usage, and consequently by rule, may establish a mode of giving notice, different from

<sup>1</sup> United States Nat. Bank v. Burton, 58 Vt. 426, citing Eagle Bank v. Hathaway, 5 Met. 212; Manchester Bank v. Fellows, 28 N. H. 302; Hartford Bank v. Stedman, 3 Conn. 489; Shelburne Falls Nat. Bank v. Townsley, 102 Mass. 177. The rule is thus stated in Forbes v. Omaha Nat. Bank, 10 Neb. 338: If an indorser reside within the same post-office delivery, whether in or out of city limits, notice of dishonor must be served personally or left at his residence or place of business, the court citing among other authority, Ireland v. Kip, 10 Johns. 490; S. C., second trial, 11 Johns. 231; Babcock v. Benham, 4 Hill, 129; Ransom v. Mack, 2 Id. 587; Louisiana State Bank v. Rowell, 6 Martin, La. N. S. 506. But the rule established by the U. S. Supreme Court is the other way and also by the highest courts of Pennsylvania, Indiana, Missouri, and South Carolina.

that required in commercial law ; for example, may provide that notice shall be sent by post, even where all the parties reside in the same place, and such a custom will be binding on the parties to a bill made payable at a particular bank.<sup>1</sup>

(c) *When holder lives in different town.* If the actual holder of a bill of exchange reside in a different town from the parties sought to be charged, the notice of non-payment may be given through the post-office, by an agent of the holder to whom the bill is transmitted for collection, although both the agent and the party notified reside in the same place.<sup>2</sup>

(d) *When notary lives at different place from parties.* When the instrument is protested by a notary living at a place different from the parties the mail can be used.<sup>3</sup>

§ 442. **What presentment must be made.** (a) *Duties of bank stated by Judge Archer.* What is reasonable diligence with respect to the time for demanding payment, and also the mode of notifying indorsers will now be considered. The duties of a collecting bank toward the indorser of a note are well stated by Judge Archer of Maryland, in the case of the Farmers' Bank v. Duvall.<sup>4</sup> After remarking that the liability of Duvall, the indorser of the note, was contingent, depending on a demand for payment of the drawer, and duly notifying the indorser of its dishonor and that on failure to do either of these things there could be no recovery against the indorser, the judge added that "the authorities independent of any particular usage, where the notes are payable so many days after date, have definitely fixed the time and mode of demand, or presentment."

(b) *Has the drawer the whole of last day of grace.* "It appears at one time to have been questioned, as the drawer had

<sup>1</sup> *Gindrat v. Mechanics' Bank*, 7 Ala. 324. When a bank is the holder of a note made payable at its banking house, the indorser is bound by a notice of non-payment by the maker given conformably to the established usage of the bank, though not conformably to the general law, *Chicopee Bank v. Eager*, 9 Met. 583 ; *Mills v. Bank of United States*, 11 Wheat. 431.

<sup>2</sup> *Gindrat v. Mechanics' Bank*, 7 Ala. 324.

<sup>3</sup> *Hartford Bank v. Stedman*, 3 Conn. 489 ; *Dan. on Neg. Ins.* § 1003.

<sup>4</sup> 7 Gill & Johns. 78.

the whole of the last day of grace to pay the money due, whether the holder could notify the indorser of the presentment and dishonor on the last day of grace; but whatever doubts may at any time have existed upon this subject, it is now abundantly settled that such a note may be demanded on the last day of grace, and that notice of the dishonor may be immediately given, or in other words, if payment on the last day of grace be not made, or be refused upon demand, the holder may at once treat the note as dishonored and give notice accordingly. But no demand of payment at any anterior day will, by the general principles of law, justify the holder to treat the note as dishonored. . . The mode of demand appears to be equally well settled. A demand without the presentation of the note would in general be equivalent to no demand, and when it is made, the holder should be prepared and ready to produce it." If, therefore, payment of a note payable sixty days after date, should be demanded on the sixtieth day after its date, this would be too soon, for it has three days more to run by commercial usage, and the indorser would not be bound.<sup>1</sup>

(c) *Farmers' Bank v. Duvall*.<sup>2</sup> Nor does the bank practice of giving notice to the makers of notes of the time when they mature, and where they have been left for collection, affect the rule with respect to making demand of payment. In the case above mentioned the court held that by the going of the mail from A. at sunrise on the 23d, and by the closing of the post-office for the receiving of letters at 9 o'clock P. M. on the 22d, this was the mail of the 22d, and consequently if a note was dishonored at A. on the 22d, it was sufficient to mail the notice for the indorser on the 23d, although no mail went again to the indorser's residence until the morning of the 25th.

(d) *Whiting v. City Bank*. Whiting sent to the City Bank of Rochester for collection a note payable there, and made by a depositor of the institution. The note fell due Sunday,

<sup>1</sup> 7 Gill & Johns. 78.

<sup>2</sup> Id.

July 4th. The previous day the bank marked the note as paid and sent Whiting a draft for the amount. The maker at that time had a small balance to his credit, but not enough to pay the note. The bank having learned on the 6th of July that the maker of the note had failed, it stopped payment of the draft, and requested Whiting to return it, saying that it had been sent by mistake. He complied with the request; at the same time the bank caused the note to be noted for protest, and mailed the notice of non-payment to the indorser. Both the protest and notice, however, were dated July 3d. The bank, though, was obliged to pay Whiting. Judge Rapallo in reviewing the law and facts pertaining to the case said: "Had the bank not treated the note as paid, and had it not remitted to the plaintiff a draft for the proceeds, but had it simply sent notice of non-payment to the indorser on the sixth of July, it would hardly be pretended that it had not performed its duty and legally charged the indorser. It was not necessary to make any demand for payment of the note as it was payable at the same bank to which it was remitted for collection, and the funds not being there to meet it, all that was necessary to be done was to notify the indorser of the non-payment. This notice having been sent on the next business day after the note became due was in time."<sup>1</sup> The only questions therefore were: whether the bank acted under a mistake of facts in treating the note as paid and in remitting the amount to Whiting; and if so, whether the mistake could be corrected. "If the payment," continued the Judge, "was not made by the bank by mistake, but was made voluntarily on the credit of the maker of the note, it is very clear that it could not be retracted. The payment of the note under such circumstances discharged the obligation of the indorser, and that obligation could not be revived by the bank, nor by any transaction between it and the plaintiff. The fact of the mistake was directly in issue in the cause. The only evi-

<sup>1</sup> *Farmers' Bank v. Vail*, 21 N. Y. 485; *Howard v. Ives*, 1 Hill, 263; *Burkhalter v. Second Nat. Bank*, 42 N. Y. 538.

dence to sustain the allegation consisted of a telegram sent by the assistant cashier of the bank to the plaintiff stating that the bank had remitted for the note by mistake and requesting a return of the draft, and of a letter from the same officer to the plaintiff, inclosing the note, stating that it had been protested for non-payment; that the book-keeper of the bank had by mistake placed it among the notes which were to be paid, and that in the press of business it was remitted, although the maker had less than \$100 to his credit; that the bank had found the address of the indorser and given him notice of non-payment. A return of the draft remitted was also requested in this letter. The plaintiff presented the draft for payment and found that payment had been stopped by the bank. . . This is all the evidence on the subject of the alleged mistake. The book-keeper by whom it is said to have been made was not called as a witness. . . The evidence to prove the mistake, was to say the least, very slight, consisting only of the unsworn declarations of the assistant cashier, he not even being the person who is alleged to have made the mistake. There is no legal presumption that payments made by a bank are made by mistake, even when the account of the party for whom they are made is not good. The fact, if material, must be proved. Certainly the fact was not conclusively proved in this case so as to justify the court in refusing to submit it to the jury. In *Troy City Bank v. Grant*<sup>1</sup> the case was submitted to the jury, and from the report it would seem that it was found or conceded that the note was honored by the bank through the merest mistake, and that the bank did not give credit to the maker, and there was no understanding that it should take up the note."<sup>2</sup>

(e) *Commercial Bank v. Union Bank*.<sup>3</sup> As a collecting bank in New York is responsible for the negligence of a sub-agent employed in the same business, illustrations of negligence may be drawn indifferently from the one or the other. In

<sup>1</sup> Hill & Denio, Supp. 119.

<sup>2</sup> 77 N. Y. 363, p. 365.

<sup>3</sup> 11 Id. 203.



the following case the sub-agent was negligent. The Troy City Bank on Friday morning the 19th of November presented and delivered to the drawee a bill on receiving his check for a larger amount, the bank paying him the excess in money. At that time, however, the drawee had not funds in the bank to the amount of the check, but on the evening of that day he made good the deficiency, including also other checks, by cash and sight drafts on New York. On the 20th he drew checks on the bank which were paid by it, and in the evening he made the bank good by cash and drafts on New York, as he had done the day before. None of the drafts were paid. On Monday, the 22d, the bank procured the bill from the drawee and demanded payment of it, protested it for non-payment and served a notice thereof on the drawer and indorsers. The bank was declared to be liable for the amount of the draft. It may be added that the bank was declared to be liable on a double ground, first, that the drawee had paid the draft to it,<sup>1</sup> and second, that the drawer and indorsers were discharged by omission of the bank to give the proper notices of the dishonor of the bill by the drawee and to take the proper measures to charge him.

(f) *Trinidad National Bank v. Denver National Bank.*<sup>2</sup> A. bank received from B. bank a sight draft for collection, drawn on C. bank against funds belonging to the drawer. A. bank received this draft for collection January 10th, and transmitted it directly to the drawee, its correspondent, on the same day. The draft ought to have reached the drawee in two days. The drawee continued good until January 29th, when it failed. The drawee did not acknowledge the receipt of the draft, and in fact the draft miscarried and was never received. The defendant made no inquiries about it until February 9th; the plaintiff and defendant both supposing, meanwhile, that it had been paid. The defendant gave the plaintiff no notice of any kind with respect to the draft until February 11th. The plaintiff, having sued the defendant for

<sup>1</sup> Pratt v. Foote, 9 N. Y. 463.

<sup>2</sup> 4 Dill. 290.

its negligent omission to give notice, was declared liable. It was also held that the usage or custom set up by the defendant, that it was not required to make inquiries concerning such remittances prior to the receipt of the regular monthly statement of accounts between banks, was not established by the evidence.

§ 443. **Liability for mistake.** (a) *In days of grace.* If payment of a note is demanded on the first day after the third day of grace and notice of dishonor is then sent, and such is the well-known usage of that place, the demand and notice are valid; and the indorser is liable. Such a usage is regarded part of the contract when borrowing the money, though not incorporated in it, whenever it is personally known to the borrower. Though three days are allowed for the payment of negotiable paper from long and universal usage, yet "it may be altered and controlled by the agreement of the parties, and what is tantamount, it may be changed by the usage and custom of dealing perfectly known to the parties and to which they will be supposed to have had special reference in making their contract."<sup>1</sup>

(b) *In nature of instrument.* A bank is responsible for mistaking the nature of an instrument, a check for a bill of exchange, for example, whereby the owner suffers loss. Thus a bill of exchange payable at ——— was sent to a bank for collection, which was considered a bank check and not entitled to days of grace. Accordingly it was presented for payment and protested on the day of maturity without days of grace, thereby discharging the indorser. It appeared on the trial that the indorser notified the bank that the instrument should have days of grace. The bank was held liable for the wrongful presentation to the person who deposited the paper for collection.<sup>2</sup>

(c) *In name of indorser.* A bank is responsible for mistak-

<sup>1</sup> Earle, J., *Bank of Columbia v. Magruder*, 6 Harr. & Johns. 172, p. 180; *Bank of Columbia v. Fitzhugh*, 1 Harris & Gill, 239; *Renner v. Bank of Columbia*, 9 Wheat. 581.

<sup>2</sup> *Georgia Nat. Bank v. Henderson*, 46 Ga. 487.

ing the name of the indorser and sending the notice to the wrong person. Thus a bank received for protest a note indorsed by John Becker. The bank officers knew a person of that name who lived at a post town three miles distant and who had property. Moreover, he was the only person of that name known by the bank, and therefore it was supposed that he was the indorser of the note. Accordingly, notice of its non-payment was given to him through the mail. In the end it was known that the indorser was another person of the same name, and who lived in a different county. The indorser having been released through the failure of the bank to give notice, it was obliged to make the loss good to the holder on the ground of negligence.<sup>1</sup> But a notice is not defective which states the promisor's name wrongly if it can be shown that the indorser is liable on no other note payable at that bank.<sup>2</sup>

(d) *In date of note.* A bank is responsible for mistaking the date of a note in consequence of which it is presented for payment before the correct time and the indorser is discharged.<sup>3</sup> But if the notice be given on the day the note falls due, although it states that the note fell due three days before, it is good.

(e) *Not liable for mistake in law.* A collecting bank is not responsible for loss caused by its mistake in a doubtful matter of law. This principle was applied in the following case: The holder of a post note, which had been issued by a bank that failed before its maturity, sent the same to another bank for collection. This bank demanded payment and gave notice of non-payment to the indorsers on the day the note was due without grace whereby they were discharged on the ground that the promisors were entitled to grace on the note, although when solvent they had paid such notes without grace. The holder then brought an

<sup>1</sup> Mount v. First Nat. Bank, 37 Iowa, 457; Borup v. Nininger, 5 Minn. 523.

<sup>2</sup> Smith v. Whiting, 12 Mass. 6.

<sup>3</sup> Bank of Delaware County v. Broomhall, 38 Pa. 135.

action against the collecting bank to recover damages for negligence in not making such demand and giving such notice as would hold the indorsers. At the time the note fell due it was shown that the question whether banks were entitled to grace on their post notes had never been decided, and that there was no uniform practice in demanding payment of these notes and of notifying the indorsers after the promisors failed. As the duty of the bank therefore in demanding payment and giving notice had not been clearly established, the action against it could not be maintained.<sup>1</sup>

§ 444. **Miscarriage of note for collection.** If a note deposited for collection miscarry in consequence of the depositor's omission to give the correct post-office address of the bank at which it is payable, the collecting bank is not responsible for the loss.<sup>2</sup>

§ 445. **When bank need not give notice of non-payment.** The collecting bank need not give notice of non-payment to the indorser if he have knowledge of the fact; in short, whenever it is unnecessary for the bank to give notice it will not be liable for neglect to notify.<sup>3</sup> Nor can a bank be held for not giving legal notice of non-payment to an indorser if it be shown that the notice was actually received in time.<sup>4</sup> But a bank is responsible to the real owner of a note for omitting to give notice of non-payment, though it was deposited by one who held it as collateral security.<sup>5</sup>

§ 446. **Demand and notice as affected by usage.** If a bank establish usages and by-laws concerning demands on makers of promissory notes and notices to indorsers, the dealings and contracts of those doing business with it are to be understood and enforced with reference to them.<sup>6</sup> Thus, the usage of a

<sup>1</sup> *Mechanics' Bank v. Merchants' Bank*, 6 Met. 13.

<sup>2</sup> *Chapman v. Union Bank*, 32 How. Pr. 95.

<sup>3</sup> *West Branch Bank v. Fulmer*, 3 Pa. 399.

<sup>4</sup> *Hallowell v. Curry*, 41 Id. 322.

<sup>5</sup> *McKinster v. Bank*, 9 Wend. 46; Aff. 11 Id. 473.

<sup>6</sup> *Lincoln & Kennebeck Bank v. Page*, 9 Mass. 155. See *Boston Bank v. Hodges*, 9 Pick. 420; *Cohea v. Hunt*, 2 Sm. & M. 227.

bank with respect to notes falling due on a particular day—like the commencement day of a college<sup>1</sup>—to make a demand on the maker and give notice to the indorser on the day preceding, will bind him on a note discounted for him at that bank if he knows of the usage. And whether the note is made payable at that bank or not is immaterial.<sup>2</sup>

(a) *And by ordinance of bank.* So, too, if the ordinance of a bank permitting the deposit of notes for collection should prescribe that the depositor must previously deposit the costs of protest, a bank would not be liable for an omission to have a negotiable note, deposited by another bank, protested for non-payment, and notices given, though it be important to fix the indorsers, unless the costs have been deposited as the law requires.<sup>3</sup>

§ 447. **When bank and holder are both negligent.** If both the collecting bank and holder are negligent, on whom shall the loss fall? The United States Supreme Court have declared that if through negligence the inference be that notice of presentment, demand and non-payment were not given to the holder, thus keeping him from notifying prior parties, the bank is responsible for the amount of the bill, even though the holder may not have been so thoughtful, active, and vigilant as he might have been.<sup>4</sup> On the occasion calling for the application of this principle a bill had been sent by the Philadelphia Bank to the other for collection, but the letter containing it slipped through a crack in the cashier's desk and was not found until after its maturity. It was contended that as the bill was in the bank at that time, and as the acceptors had no funds there, a sufficient presentment and demand had been made to satisfy the law merchant. But Judge Nelson said: "It is true the bill was there physically, but, within the sense of this law, it was no more present at the

<sup>1</sup> Even if it be not a legal holiday.

<sup>2</sup> *City Bank v. Cutter*, 3 Pick. 414.

<sup>3</sup> *Pendleton v. Bank*, 1 T. B. Mon. (Ky.) 171.

<sup>4</sup> *Chicopee Bank v. Philadelphia Bank*, 8 Wall. 641.

bank than if it had been lost in the street by the messenger on his way from the post-office to the bank, and had remained there at maturity, and this loss, which occasioned the failure to take the proper steps, or rather, in the present case, to furnish the holder with the proper evidence of the dishonor of the paper, so as to charge the prior parties, and enable him to have recourse against them, is wholly attributable, according to the verdict of the jury, to the collecting bank. In the eye of the law merchant there was no presentment or demand against the acceptors; and, as a consequence of this default, the holder has lost his remedy against the drawer and indorser, which entitles him to one against the defendant.”<sup>1</sup>

§ 448. **Agreement to collect note in another State.** If a bank agrees for a consideration to collect a note payable in another State and neglects to give information of non-payment and to return the note to the depositor within a reasonable time, it is liable. And if at the time of bringing an action against the bank to recover the loss, the note is barred by the Statute of Limitations and the bank has never returned it until then, and the maker is solvent, the measure of damages will be the amount due on the face of the note with interest less the amount to be paid for collecting it.<sup>2</sup>

§ 449. **Duty of bank when note is not negotiable.** If a note be not negotiable, of course, the duty of the bank is lessened. But a bank is liable if any loss be made by regarding notes as non-negotiable which are negotiable, and treating them accordingly. Thus a note was given of the following form: “Fourteen and one-half months after date, I promise to pay to the order of the American Engine Company \$450, at seven per centum, at the Havana National Bank, at Havana, N. Y., value received, being in part payment for a portable engine,

<sup>1</sup> With respect to the burden of proof the judge said: “The loss of the bill by the bank carried with it the presumption of negligence and want of care; and, if it was capable of explanation, so as to rebut this presumption, the facts and circumstances were peculiarly in the possession of its officers, and the defendant was bound to furnish it.”

<sup>2</sup> *Wingate v. Mechanics' Bank*, 10 Pa. 104.

which engine shall be and remain the property of the owner of this note, until the amount hereby secured is fully paid." It was indorsed and afterward deposited with the Havana National Bank for collection. In a suit against it for negligence in not collecting the note, which consisted of an omission to protest the same properly and notify the indorsers, the note was declared to be negotiable and the bank negligent as described.<sup>1</sup>

§ 450. **When bank is liable though charging all parties.** A collecting bank may so act as to charge all the parties properly to a bill or note and yet be liable for a loss which could have been prevented by the exercise of greater diligence on its part. Says Judge Earl: "It is the duty of an agent who receives negotiable paper for collection, in case such paper is not paid, so to act as to secure and preserve the liability thereon of all the parties prior to his principal; and if he fails in this duty, and thereby causes loss to his principal, he becomes liable for such loss. But this is not the utmost limit of the agent's duty and liability. He may so act as to charge all the parties to the paper and yet become liable for a loss occasioned by his negligence. The rule which will measure the diligence which is exacted of a holder of such paper, in order to charge the prior parties, will not always measure the diligence which is required of a collecting agent in the discharge of his duty to his principal. Suppose an agent receives for collection from the payee a sight draft. No circumstance can make it his duty in order to charge the drawer to present it for payment until the next day. He has entered into no contract with the drawer, is not employed or paid by him to render him any service, and owes him no duty to protect him from loss. What is required to be done to charge the drawer is simply a compliance with the condition attached to the draft, as if written therein; and that condition is in all cases complied with by presentation, demand and notice on the next day after receipt of the draft. But suppose the

<sup>1</sup> Mott v. Havana Nat. Bank, 22 Hun, 354.

agent on the day he receives the draft, obtains reliable information that the drawee must fail the next day, and that the draft will not be paid unless immediately presented, what then is the duty he owes his principal, whose interests for a compensation he has agreed with proper diligence and skill to serve in and about the collection of the draft? Clearly, all would say, to present the draft at once, and if he fails to do this and loss ensues, he incurs responsibility to his principal; and yet the drawer would be charged if it was not presented until the next day. When an agent receives a bill for collection payable some days or months after date, in order to charge the drawer, he need not present it for acceptance until it falls due; and if he then presents it and demands payment, and protests it, and gives the notice, the drawer is held; and yet, in such a case, he owes his principal the duty to present the bill for acceptance at once, and if he fails in such duty, and loss ensues to his principal, he becomes liable for such loss."<sup>1</sup>

§ 451. **Negligence of one bank to another.** A bank failed owing another for notes sent by it for collection. The bank which sent the notes had paid the full amount to other banks from which they had been received. The cashier of the sending bank, which was the plaintiff in the case, had given notice to the cashier of the failed bank to protest and return all notes not paid, but the note of S., which had been sent for collection and charged to the failed bank and entered in the account against it, was not paid by S., neither was it protested or returned, or any notice of its non-payment given to the sender. A semi-monthly statement of the account was sent by the cashier of that bank to the cashier of the failed one who acknowledged that it was correct. The directors of the failed bank did not know that the note had been received, and its indebtedness to the other bank was met by drafts furnished by S. to the cashier. A large portion of

<sup>1</sup> First Nat. Bank v. Fourth Nat. Bank, 77 N. Y. p. 323; Allen v. Suydam, 17 Wend. 368.



these, however, were not paid. The sending bank having sued the other to recover the balance due, it was decided, first, that it did right in charging the note to the other bank after a reasonable time had elapsed since sending it, and no notice of non-payment had been received or the paper returned; and second, that the failed bank was liable notwithstanding the lack of knowledge of the misdoings of its cashier by the directors. "It is perfectly apparent," said Judge Butler, "that the cashier of the defendant bank received the notes, drafts and checks sent by the plaintiffs for collection; that he had ostensibly the powers usually given to the cashier of such an association; that it was his duty to collect them or to protest and return them; and that by retaining them without collection, protest or notice, he made the defendant bank liable to the plaintiffs for their amount."<sup>1</sup>

§ 452. **When last indorser can recover of collecting bank.** If the last indorser on a note left with a bank for collection pays it supposing that proper demand has been made of the prior indorsers, he can recover back his money on proving that the bank neglected to do this thereby discharging them.<sup>2</sup> If, on the contrary, he should pay the note knowing that no demand had been made, or that it was informal and irregular, then, "on the clearest principles of common sense and common justice," he could not recover.<sup>3</sup>

§ 453. **Bank cannot sell note.** The leaving a note with a bank for collection does not authorize it to sell the same. But if it does so without authority, and satisfies the payee, the purchaser cannot afterward collect it of the maker's surety.<sup>4</sup>

(a) The payee of a joint and several note at the request of the principal maker (the others having executed the same for his accommodation), sent it to a bank for collection. C., at the principal's request, and by agreement that the note should

<sup>1</sup> *Pahquioque Bank v. Bethel Bank*, 36 Conn. 325, p. 341.

<sup>2</sup> *Garland v. Salem Bank*, 9 Mass. 408; *Halls v. Bank*, 3 Rich. 366.

<sup>3</sup> *Halls v. Bank*, *supra*.

<sup>4</sup> *Fuller v. Bennett*, 55 Mich. 357.

be transferred to him, paid the amount to the bank and received the note. The bank sent the money to the payee who supposed that it had been paid to discharge the obligation. After learning the facts however, he retained the money. In an action by C. on the note, it was decided that although the bank had no authority to sell it, yet the payee had retained the money long enough after his knowledge of the transaction to ratify the sale; and further, that in the absence of evidence of injury to the sureties, by remaining quiet under the belief that the note had been paid, C. could recover.<sup>1</sup>

§ 454. **How check must be collected.** We now pass to the collection of checks.<sup>2</sup> Concerning these it is the duty of the collecting bank to present them and demand payment within the time prescribed by law, and if they are not paid, to notify the proper parties of their dishonor. If credit has been given to the depositor for the amount this may be cancelled.<sup>3</sup>

§ 455. **Principles in important cases.** (a) *First National Bank v. Fourth National Bank.*<sup>4</sup> Two cases, the outcome of one event, illustrate some of the most important principles in the collection of checks as well as in the mode of proceeding, when they have been taken but not paid in discharge of a draft or other written evidence of indebtedness. On the 22d of March, 1866, the National Bank of Crawford County, at Meadville, Pa., delivered to the First National Bank of Meadville a sight draft drawn on Culver, Penn & Co., brokers in New York. The latter bank indorsed the draft and sent it by mail to its corresponding bank in New York, the Fourth National, for

<sup>1</sup> *Coykendall v. Constable*, 99 N. Y. 309.

<sup>2</sup> For duty of collecting bank to the sender of a forged check, see § 198.

<sup>3</sup> *Decatur Nat. Bank v. Murphy*, 9 Brad. 112. "In cases of checks, which bear a strong resemblance to bills of exchange, the party receiving one is not chargeable with laches, though he does not present it the day it is drawn. He is under no legal obligation to run with it immediately to the bank. A reasonable time is allowed for that purpose, and the next day is held to be such reasonable time," *Hubbard, J., Taylor v. Wilson*, 11 Met. p. 51.

<sup>4</sup> 77 N. Y. 320; Rev. 16 Hun, 332; second trial, 89 N. Y. 412.

collection and credit. The draft was received on the morning of March 26th and immediately presented to the drawees for payment. The drawees took the draft and gave their check for the amount on the Third National Bank of the same city. This check was not presented on the same day for payment, but it was sent through the clearing-house on the 27th. On that day, however, Culver, Penn & Co. failed, and the Third National Bank refused to pay the check. The Fourth National Bank then returned the check to Culver, Penn & Co., received back the draft, formally demanded payment of it, caused the same to be protested for non-payment, and on the next day, March 28th, served notice of the non-payment by mail on the First National Bank of Meadville and also on the drawer. In the first place it was decided that the Fourth National Bank performed its whole duty in charging the drawer, in other words, in rendering him liable on the draft.<sup>1</sup> In the second place it was the duty of the Fourth National Bank to have been reasonably diligent in presenting the check for payment or certification, and this duty required it to present the check to the Third National Bank for payment or certification on the day it was received. Said Judge Allen in another case<sup>2</sup> involving the same principle: "When a check is taken instead of money, by one acting for others, a delay of presentment for a day or for any time beyond that within which with proper and reasonable diligence it can be presented, is at the peril of the party thus retaining the check and postponing presentment as between him and the persons in interest, whom he represents." He also added that "if a custom can exist in law and does exist in fact, authorizing such delay at the risk of the absent principal, it must be shown; it cannot be presumed to exist without evidence." The account of Culver, Penn & Co. at the Third National Bank was largely overdrawn on the day when the check was received by the

<sup>1</sup> *Turner v. Bank of Fox Lake*, 3 Keyes, 425; S. C., 4 Abb. App. Dec. 434; Aff. 23 How. Pr. 399; *Burkhalter v. Second Nat. Bank*, 42 N. Y. 538.

<sup>2</sup> *Smith v. Miller*, 43 Id. p. 176.

Fourth National Bank. On the other hand, the bank had permitted them to overdraw during any day, they depositing collaterals or making the account good the next day. Moreover, the bank paid all checks until Culver, Penn & Co.'s failure, including one drawn after the check given to the Fourth National Bank in payment of the draft. These facts, the court decided, justified the conclusion that the check in question would have been paid had it been promptly presented.

(b) *Burkhalter v. Second National Bank*.<sup>1</sup> In the other case the Second National Bank of Erie, Pennsylvania, on the 24th of March, drew a draft in favor of J. & B. on Culver, Penn & Co. J. & B. indorsed and forwarded the same to Burkhalter of New York, who received it on the morning of the 26th, about nine o'clock. It was soon afterward presented for payment to Culver, Penn & Co., who gave their check for the amount on the Third National Bank of that city. The draft was immediately charged to the drawer, the Erie bank. When the check was presented the next day through the clearing-house in the usual course of business payment was refused, Culver, Penn & Co. having failed on that day as previously described. Burkhalter then returned the check to the makers, received the draft and presented that again for payment through a notary public, which was refused. The draft was then protested for non-payment and notices of protest were sent the next day, the 28th. If Burkhalter "had demanded the currency on the draft of Culver, Penn & Co. on the 26th, or early in the day of the 27th, it would most probably have been paid; but if all the persons, who, during the same time presented drafts on them, had demanded currency, they could not have paid them all."<sup>2</sup> In a suit by Burkhalter against the drawer, the Second National Bank, Chief Justice Earl said that he was "bound to demand payment of the first draft on the day he received it [March 26th] or the next day, and he had the right to hold it until the 27th. The draft being payable on demand, he was bound to use

<sup>1</sup> 42 N. Y. 538.

<sup>2</sup> Reporter's statement.

reasonable diligence in demanding payment, and a demand on the same day, or the next day, is, in the law, a demand within a reasonable time.<sup>1</sup> It was sufficient to give the notice of demand and refusal on the next day, the 28th of March.<sup>2</sup> Therefore, in demanding payment of this draft on the 27th and mailing notices of non-payment on the 28th, Burkhalter did all that the law required of him, and the Second National Bank was charged as drawer of the draft, unless it was discharged by what took place on the 26th. On that day the draft was neither paid nor refused to be paid. Culver, Penn & Co. gave their check for it, and the check was in due time, the next day, in the ordinary course of business, through the clearing house, presented for payment and payment refused. There was no agreement to receive the check in payment. It was taken by Burkhalter in the usual course of business, he believing that it would be paid. He, then, on the 27th, returned the check and reclaimed the draft and demanded payment upon it. The check did not for a moment operate as a payment of the draft, and the whole transaction does not show the absence of any diligence, which the defendant had a right to demand of the plaintiff. It is settled that upon precisely such a state of facts the drawer and indorser of a draft are not discharged."<sup>3</sup>

(c) *Shipsey v. Bowery National Bank*. Shipsey deposited a check drawn by M. on a bank at Portchester with a bank in New York for collection, which was credited to his account. It forwarded the check on the second of the month. It should have reached the other bank on the next day and an answer would have reached the New York bank on the fourth. The check was lost, but the New York bank did not know

<sup>1</sup> Chitty on Bills, 377; Harker v. Anderson, 21 Wend. 372; Smith v. Janes, 20 Id. 192; Benton v. Martin, 31 N. Y. p. 385; Merchants' Bank v. Spicer, 6 Wend. 443; Hazleton v. Colburn, 2 Abb. Pr. N. S. 199.

<sup>2</sup> Farmers' Bank v. Vail, 21 N. Y. 485; Howard v. Ives, 1 Hill, 263.

<sup>3</sup> Citing Johnson v. Bank of North America, 5 Robt. p. 590; Smith v. Miller, 6 Id. 157, 413; Turner v. Bank, 3 Keyes, 425. For rule of damages in these cases see § 482.

of this until the sixteenth. Two days afterward it notified Shipsey that the check had not reached the Portchester bank, and if not found, a duplicate would be required. The drawer, M., had enough funds with the drawee to meet the check until the twentieth, when he became insolvent, and subsequently the New York bank charged the check back to Shipsey. In an action to recover the amount of the check it was held that the New York bank was negligent in not sooner discovering the loss and notifying Shipsey and therefore was liable to him for the damage he had sustained.<sup>1</sup>

(d) *Application by depositor of his deposit.* In the above case another important principle was applied. The drawer, M., left with Shipsey on the twentieth more than enough money to pay the check. Shipsey at that time had other checks of M. exceeding the amount paid which had been forwarded for collection and dishonored, of which latter fact however Shipsey was ignorant. M. did not direct how the money should be applied, and Shipsey applied it on the checks last mentioned. It was held that there was an existing indebtedness to Shipsey on the dishonored checks at the time of payment, although he was ignorant of it, that he had a right within a reasonable time to elect on which indebtedness he would apply the payment, and having so elected the check in question remained unpaid and the defendant bank was liable therefor.

(e) *Indiana case.*<sup>2</sup> An interesting case involving numerous questions of a very practical character was decided by the Supreme Court of Indiana in 1881. A., a bank, holding a check drawn in its favor indorsed it to B., a bank, "for collection for account of" A., and sent it by mail to B. with a letter from the cashier stating, "I inclose for collection and cr., as stated below (specifying other drafts and checks). The check was placed by B. on its collection register where checks received for collection only were entered, nor was any credit

<sup>1</sup> Shipsey v. Bowery Nat. Bank, 59 N. Y. 485.

<sup>2</sup> First Nat Bank v. First Nat. Bank, 76 Ind. 561.

given therefor. The cashier of B. inclosed the check for collection and sent it to bank C., with authority by letter to credit B. with the proceeds when collected. B. on the same day failed, and the bank examiner took possession. Two days afterward C. received the check and by its cashier presented it, received payment, and credited the amount on its books to B. which was at that time the debtor of C. Before the cashier of C. collected the check, he had notice by newspaper report of B.'s failure, but did not notify the drawee who had no notice of the event. Shortly afterward the bank examiner, who had the books of the B. bank in his possession, without the knowledge or consent of A., credited A. and charged C. with the amount of the check. The B. bank at that time was also indebted to A. In an action by A. against C. it was decided (1) that it could recover the money collected by C. on the check; (2) that the indorsement of the check to B. by A. did not vest the title to it in B. nor give it any right to the proceeds, and that the letter accompanying it meant simply that B. should collect the money for A. and place it to A.'s credit, and not that B. should treat the check as its own or credit A. therewith before collection, and that B. received the check merely as the agent of A. for collection with authority to credit A. when collected; (3) that the transactions did not make B. the debtor of A. before the check was collected, nor did it deprive the latter of its right to the check or its proceeds before collection by B.; (4) that C. must be regarded as the agent of B. in making the collection and having been duly notified by the indorsement on the check that B. was not the owner of it nor entitled to the proceeds, C. had no right to credit the amount to B. on its indebtedness to C.; (5) that the newspaper notice of B.'s failure was sufficient to require C. to regulate its action with a view to the rights of A. as affected by such failure. The failed bank had a power to collect not coupled with an interest, for if it had collected the money A. might have withdrawn the funds the next moment, and as C. was the agent of that bank for collection it had no greater right to the check as against A. than its prin-

cipal. (6) That the directions in the letter of the cashier of A. to B. was an authority to mingle the fund with the general funds of the bank when collected whereby A. would have become the general creditor, but the insolvency and suspension of B. operated as a revocation of such authority, and if it had the authority to collect at all after such suspension A. was entitled to the specific fund, and C. being the agent of B. had no more power or right to the specific fund than its principal. (7) That what was done after B.'s suspension by the direction of the bank examiner without the knowledge or consent of B. could not injuriously affect its rights. (8) That the fact that C. had credited the amount collected on its debt against B. could not discharge it from liability. (9) That the bankruptcy of an agent operates as a revocation of his authority, and authority to a bank to place collections to a customer's credit when collected must be considered as revoked by its suspension and failure.

§ 456. **Collection of check on forged indorsement.** When a collecting bank collects a check at the request of a party not lawfully entitled to it, for example, a check having a forged indorsement, the true owners are entitled to the money collected whether it has been paid over to others or not. In *Johnson & Higgins v. The First National Bank*<sup>1</sup> the plaintiffs were the owners of a series of checks payable to their order that were stolen by their clerk, their indorsement was forged thereon, and finally they came into the possession of the defendant bank. It paid value for them, without notice that *Johnson & Higgins's* name had been forged, and it collected them in ignorance of the fact. The firm having sued to recover the amount collected, the court followed the decision in *Talbot v. Bank of Rochester*,<sup>2</sup> in which case the bank was held liable to the owner for the proceeds of a certificate of deposit which it had received and collected on the faith of a forged indorsement, and for the reason that it had received and collected the obligation of the plaintiff in the action, and

<sup>1</sup> 68 N. Y.; Aff. 6 Hun, 124.

<sup>2</sup> 1 Hill, 295.



by those acts had become liable to him for the amount realized from it. In the case under consideration Judge Daniels said: "The mere fact that the money of the plaintiffs collected by the defendant without right was afterward paid over to the other persons should not, upon principle, discharge the defendant from liability. That occurred at once in the present case as soon as the checks were disposed of and the money was received upon them. The defendant then, in judgment of law, held it for the plaintiffs, who were its rightful owners, and it could not be exonerated from its obligation by paying the amount to others who had never been authorized to receive it. In making such payment, as well as in the conversion of the checks, unindorsed by them, into money, it acted so far in hostility to their rights as to become liable to them for the loss so occasioned. This is a general principle well settled in the law; and it includes commercial paper not in a condition to be negotiated as well as other property. The party receiving and disposing of it, in that condition, without authority, cannot avoid liability by showing that its conduct was governed by good faith,<sup>1</sup> or that it afterward paid over the proceeds to persons not in fact entitled to receive them."<sup>2</sup>

**§ 457. Unnecessary delay in presentation.** If a bank receive a check for collection and retain the same for four days without making any effort to collect it or give notice to the depositor of its non-payment, the bank is liable in the event of loss. In such a case a promise subsequently made by the depositor to pay to the bank the amount due by reason of the loss is a contract without consideration.<sup>3</sup>

**§ 458. Should not send check to drawee bank for payment.** A collecting bank should not send a check or other instrument to the bank primarily liable thereon for payment. To

<sup>1</sup> *Boyce v. Brockway*, 31 N. Y. 490.

<sup>2</sup> See also *Justh v. National Bank*, 56 Id. 478; *Van Alstyne v. National Com. Bank*, 7 Trans. App. 241; S. C., 4 Abb. App. Dec. 449; *Crandall v. Schroepfel*, 1 Hun, 557.

<sup>3</sup> *Bank of New Hanover v. Kenan*, 76 N. Car. 340.

do this is negligence. In a recent case a certified check by a banking house was deposited with a bank for collection, which sent it to the certifiers for payment. The reason why the bank did so was because it had no correspondent in the town where the bankers lived to demand payment of the check. The bankers, instead of sending money for the check, sent their own draft on another banker; this, however, was not paid because they were insolvent. The depositor asked the collecting bank to make his loss good, and Judge Schofield, who delivered the opinion of the court, said: "Surely it could not be held reasonable care and diligence in an agent holding for collection a promissory note given by one individual to another individual, to send the promissory note to the maker, trusting to him to make payment, delay it, or destroy the evidences of indebtedness, and repudiate the transaction as his conscience might permit? If this would not be held to be reasonable care and diligence, why should the same contract be held to be reasonable care and diligence when applied to a bank?" The bank maintained it had no other means at the place of payment to collect the check. But it was under no obligation to the plaintiff to undertake this collection. It should have informed the plaintiff of the difficulty it was under, and then acted on its directions. If the defendant felt authorized to take the risk without special stipulations the plaintiff was authorized to assume that it was able to make the collection, and that it had a proper agent through whom to do it promptly.<sup>1</sup>

§ 459. **Liability when acting for public accommodation.** The State treasurer of New Jersey having been informed that the State Bank at New Brunswick was in an embarrassed condition, drew on a State deposit in the bank and deposited the draft for collection in the Trenton Bank where an account also was kept. The amount of the draft was credited to the treasurer while it was forwarded for collection the same day,

<sup>1</sup> *Drovers' Nat. Bank v. Anglo-American Pack. and Prov. Co.*, 117 Ill. 100; *Aff. 18 Brad.* 191; *Merchants' Nat. Bank v. Goodman*, 16 Week. No. Cas. 513.

received by the State Bank the next day, charged to the treasurer and credited to the Trenton Bank. At one o'clock that day the State Bank closed its doors in consequence of insolvency. The Trenton Bank was declared to be not chargeable with the loss, as it was acting only as a collecting agent for the accommodation of the State; besides, the omission of the treasurer to impart his knowledge of the failing condition of the State Bank discharged the other.<sup>1</sup>

**§ 460. Is consideration necessary to hold bank for negligence.**

In some cases stress has been laid on the want of consideration for collection to excuse the collecting bank. In an Ohio case, in which a bank was excused for another reason, the court also added as a kind of make-weight that the institution had no agreement for compensation as collecting agent, nor any expectation of receiving one beside the incidental advantage pertaining to such service.<sup>2</sup>

**§ 461. Notice.** (a) *How notice should be given.* "Sometimes," says Daniel, "a bank holding indorsed paper for collection sends notice, in the event of its dishonor, to the indorser from whom it was received. Sometimes it sends notices not only to him, but also to the drawer and to all the indorsers, addressed to their post-offices, or delivered at their places of business, respectively. Sometimes it incloses notices for all the parties entitled thereto under one envelope in company with notice to the last indorser, that he may thus be conveniently supplied with the means of transmitting notice to the successive indorsers, and to the drawer, antecedent to him, if such there be. But how far the duty of the bank extends in this regard, and what it must do to discharge itself of liability, is a question upon which opinion has divided. The weight of authority, however, is strongly to the effect, and the law may be assumed to be, that it is only necessary for the bank to notify its immediate predecessor, that is, the party from whom it received the paper, no matter

<sup>1</sup> Freeholders of Middlesex v. State Bank, 32 N. J. Eq. 467.

<sup>2</sup> Bank v. Butler, 41 Ohio St. 519.

what may be the nature of the title or interest of that party to or in it. But special circumstances may vary this general principle. Thus an agreement between the bank and its principal may vary it. So also may a usage of the collecting bank. And a local usage, as in the city of New York, for the collecting bank to notify all parties entitled to notice, would undoubtedly be respected and enforced.”<sup>1</sup>

(b) *Notary must disclose his agency.* In giving notice the notary must disclose his agency. Whenever a suit is brought to recover on a protested draft the plaintiff must prove the notice; that it was in due time and was by some party to the instrument, but the holder may act, in giving notice by an agent, and in his name. And in a suit on such an instrument if there be any evidence to show that the notary acted in behalf of the holder, judgment will be rendered in his favor. And when the evidence in a case showed that the notary was employed by a bank holding a draft to protest it, that on the same day a notice of dishonor was made and forwarded by him, the court declared that “the notary had no motive to act in his own behalf,” and that “the duty rested on the bank to give notice” and that these facts and circumstances seemed sufficient to prove the agency of the notary.<sup>2</sup>

(c) *Notice must be properly addressed.* The letter or envelope containing the notice must be “accurately directed and addressed.” Says Judge Veazey: “This is the tenor if not the precise language of all the books, the same particularity being required in the direction as in the address. Yet it is not every change or mistake in the direction of a notice that vitiates it.” “‘If the error is merely nominal,’” quoting from Story, “‘and is not calculated to mislead, or does not mislead the party, the mistake will not be fatal.’” The word ‘accurately’ as applied to direction and address of notice of dishonor, has not been so defined that a court can in each case say as matter of law just what alteration constitutes an in-

<sup>1</sup> Neg. Inst. § 331, approved in *Locke v. Merchants' Nat. Bank*, 66 Ind. p. 363.

<sup>2</sup> *United States Nat. Bank v. Burton*, 58 Vt. 426.

accuracy." In a Vermont case the draft was signed Burton & Sowles, who were copartners. The envelope containing the notice was addressed, "O. A. Burton, Edward A. Sowles," one name above the other. It did not appear that there was any delay, or that any one was misled. Consequently, though the letter was not accurately addressed, the judgment was not erroneous.<sup>1</sup>

(d) *Notice must be given to all indorsers.* In giving notice to indorsers all are included, whether indorsers for value or agents for collection. Thus, a branch of the Planters' Bank, in Tennessee, purchased a bill of W. The bill was transmitted to J., president of the principal bank at Nashville, who indorsed the same to a New Orleans bank for collection. Having been protested, a notice of the same was sent to J. He, too, had the same time to give notice to the branch bank as though he were the owner of the bill, and so had the branch bank the same time to give notice to W., and he to M., a prior indorser.<sup>2</sup>

In the event of a bank's failure, if it should put its notes for collection into the hands of a private bank, and make his office its own for discount and deposits, and the maker and indorser of a note should know this, a presentation and demand of payment at his office would be sufficient.<sup>3</sup>

§ 462. **Authority of collecting agents.** (a) *Are holders for collection, demand and notice.* "Collecting agents are recognized in the law as holders for collection, and for all purposes of demand and notice, and the exercise of due diligence after dishonor, they are holders of the note; and the law imposes upon them the duty of doing all that the owner would be

<sup>1</sup> United States Nat. Bank v. Burton, 58 Vt. 426. "In the Bank of Utica v. Smith, 19 Johns. 231, the court decided that a demand of payment of a note by a notary, or a person having a parol authority for that purpose, or the lawful possession of the note, is sufficient." The note, on payment, would have been surrendered, and wherever this may be lawfully done by the holder, he may make the demand," McLean, J., Browning v. Andrews, 3 McLean, p. 578.

<sup>2</sup> McNeil v. Wyatt, 8 Humph. 125.

<sup>3</sup> Crews v. Farmers' Bank, 31 Gratt. 348.

required to do for the protection of his rights, and makes them liable over to the owner for default in that duty."<sup>1</sup>

(b) *Degree of diligence in notifying.* In a well-considered case against a collecting agent in which it was claimed that he had been negligent in notifying the indorser, Judge Butler said:<sup>2</sup> "Due diligence in respect to notice becomes necessary in consequence of the dishonor of the note, is to be exercised subsequently to that event, and can involve no prior precautionary act. In strictness, therefore, it cannot be claimed as an element of due diligence, that the owner, if he has knowledge of the residence of an indorser, shall send or give that knowledge, prior to dishonor, to a distant holder for collection; although if the holder 'for collection' has such knowledge, he must communicate it to the servants or notary whom he employs after dishonor."

(c) *What knowledge owner must give to agent.* "A rule requiring the owner to send his knowledge of the residence of the indorser with the note to a holder for collection, would be one involving much painstaking on the part of the owner, which the indorser has no just right to insist upon. If precaution is to be exercised before dishonor, to avoid the possibility of mistake, the indorser should be required to append his residence to his indorsement."<sup>3</sup>

(d) *Remarks on the rule.* "Moreover, such a rule would embarrass the collection of negotiable paper, for unless a special communication from the owner to the holder for collection accompanied the note, the latter would not know whether the owner knew the residence or not, and consequently whether any diligence on his part would avail or not, and his only safe rule of action would be to send the notices, in all cases, to the owner to be forwarded. Such a rule is un-

<sup>1</sup> Davey v. Jones, 42 N. J. Law, p. 30, citing Bartlett v. Isbell, 31 Conn. 296; Titus v. Mechanics' Nat. Bank, 35 N. J. Law, 588; Beale v. Parrish, 20 N. Y. 407.

<sup>2</sup> Bartlett v. Isbell, 31 Conn. 296.

<sup>3</sup> See the remarks of Bronson, J., in Ransom v. Mack, 2 Hill, p. 592, and of Church, J., in Belden v. Lamb, 17 Conn. 441.

necessary. If a holder for collection or his servant, or a notary, can not learn the residence of the indorser by due diligence, he can and should send the notice to the owner to be forwarded." In this case the collecting agent presented a note for payment, which having been refused, he delivered it to a notary for protest. Neither the agent nor the notary had any knowledge of the indorser's residence. The plaintiff had knowledge of it, but did not communicate the information. The agent and the notary used due diligence to ascertain it, and were led to believe that it was in M., and sent a notice to the indorser there. He resided in N. and never received the notice. Nevertheless, it was declared to be sufficient.

(e) *When collecting agent is responsible for draft left by another agent.* When a draft is left with a banker for collection and he transmits the same to a collecting agency near the drawee, the agency is directly responsible to the owner of the draft. Such an agency can be discharged, however, by paying over the money when collected to the banker from whom the draft was received, but not by crediting his account with the amount.<sup>1</sup>

<sup>1</sup> *Echarte v. Clark*, 2 Edm. Sel. Ca. 445. The principal collection agency cases not mentioned are *Hoover v. Wise*, 91 U. S. 308; *Bradstreet v. Everson*, 72 Pa. 124; *Morgan v. Tener*, 83 Id. 305; *Weyerhausen v. Dun*, 100 N. Y. 150.

## CHAPTER II.

LIABILITY OF THE COLLECTING BANK AND SUB-COLLECTING BANK  
TO THE OWNER.

A LONG controversy has been waged by the State courts whether a second or sub-collecting bank, appointed by the first, shall be held responsible for its negligence to the owner of the note sent for collection, or whether the first collecting bank shall be held responsible also for the negligence of the second or sub-agent.

§ 463. **In New York first bank is responsible for sub-agent.** In New York, the first bank is responsible for the negligence of the second. Judge Allen thus broadly declares the law: "A bank receiving a bill or promissory note for collection, whether payable at its counter or elsewhere, is liable for any neglect of duty occurring in its collection, by which any of the parties are discharged, whether of the officers and immediate servants or other agents of the bank, or correspondents or agents employed by such correspondents."<sup>1</sup> In 1839, the highest Court in the State<sup>2</sup> rendered this formal determination on the subject: "Resolved, that when a bank or broker, or other money dealer, receives upon a good consideration a note or bill for collection in the place where such bank, broker, or dealer carries on business, or at a distant place, the party receiving the same for collection is liable for the neglect, omission, or other misconduct of the bank or agent to whom the note or bill is sent either in negotiation, collection, or paying over the money, by which the money is lost or

<sup>1</sup> *Ayrault v. Pacific Bank*, 47 N. Y. 570, p. 573; *Walker v. Bank*, 9 Id. 582; *Commercial Bank v. Union Bank*, 11 Id. 203; *Montgomery Co. Bank v. Albany City Bank*, 7 Id. 459.

<sup>2</sup> *Allen v. Merchants' Bank*, 22 Wend. p. 244.



other injury sustained by the owner of the note or bill, unless there be some agreement to the contrary express or implied."

(a) *Where this rule prevails.* The same rule has been applied in New Jersey,<sup>1</sup> Pennsylvania,<sup>2</sup> Ohio,<sup>3</sup> Indiana,<sup>4</sup> Michigan,<sup>5</sup> and by the Supreme Court of the United States<sup>6</sup> and in England. In the case before the latter tribunal a Pittsburgh bank sent to one in New York for collection drafts drawn on a company in Newark, New Jersey. The New York bank accordingly sent them to a bank in Newark for collection, and which was negligent in performing the service. The Pittsburgh bank having sued its New York correspondent to recover the loss, Judge Blatchford said in delivering the opinion of the court: "We regard as the proper rule of law applicable to this case that declared in *Van Wart v. Woolley*,<sup>7</sup> where the defendants, at Birmingham, received from the plaintiff a bill on London, to procure its acceptance. They forwarded it to their London banker, and acceptance was refused, but he did not protest it for non-acceptance or give notice of the refusal to accept. Chief Justice Abbott said: 'Upon this state of facts it is evident that the defendants (who cannot be distinguished from, but are answerable for their London correspondent) have been guilty of a neglect of the duty which they owed to the plaintiff, their employer, and from whom they received a pecuniary reward for their services. The plaintiff is, therefore, entitled to maintain his action against them, to the extent of any damage he may have sustained by their neglect.' In that case there was a special pecuniary reward for the service. But upon the prin-

<sup>1</sup> *Titus v. Mechanics' Nat. Bank*, 35 N. J. Law, 588.

<sup>2</sup> *Wingate v. Mechanics' Bank*, 10 Pa. 104.

<sup>3</sup> *Reeves v. State Bank*, 8 Ohio St. 465.

<sup>4</sup> *Tyson v. State Bank*, 6 Blackf. 225.

<sup>5</sup> *Simpson v. Waldby*, 30 Northwest. Rep. 199; *Mackersy v. Ramsays*, 9 Clark & Fin. 818; *Bank v. Moore*, Hamilton Co. Dis. Ct., 4 Bull. 291.

<sup>6</sup> *Exchange Nat. Bank v. Third Nat. Bank*, 112 U. S. 276; *Taber v. Perrot*, 2 Gall. 565; *Hyde v. First Nat. Bank*, 7 Biss. 156.

<sup>7</sup> 3 Barn. & Cr. 439.

ciples we have stated, we are of opinion that by the receipt by the defendant of the drafts in the present case for collection, it became, upon general principles of law, and independently of any evidence of usage, or of any express agreement to that effect, liable for a neglect of duty occurring in that collection, from the default of its correspondent in Newark."

§ 464. **In Massachusetts first bank is not responsible for sub-agent.** On the other hand, in Massachusetts "when a note is deposited with a bank for collection, which is payable at another place, the whole duty of the bank so receiving the note in the first instance is seasonably to transmit the same to a suitable bank or other agent at the place of payment. And as a part of the same doctrine it is well settled that if the acceptor of a bill or promisor of a note has his residence in another place, it shall be presumed to have been intended and understood between the depositor for collection and the bank, that it was to be transmitted to the place of the residence of the promisor, and the same rule shall then apply as if on the face of the note it was payable at that place." In *Fabens' Case* "it was known at the time of the indorsement of the note that the promisor lived in Philadelphia, and, of course, that the note must be sent there for collection. We are therefore of opinion that the defendants had performed their duty when they transmitted the note to a solvent bank in good standing and were not responsible for the misfeasance or negligence of that bank."<sup>1</sup>

<sup>1</sup> Shaw, C. J., *Fabens v. Mercantile Bank*, 23 Pick. p. 332, the learned judge adding that "we cannot perceive that it makes any difference in respect to the defendant's liability that this note was received as collateral security. The general property was still in the plaintiff. It was to be collected for him," *Dorchester Bank v. New England Bank*, 1 Cush. 177. The case of *Bank of Washington v. Triplett*, 1 Pet. 25, was cited to sustain the position of the court, but the United States Supreme Court in the latest case on the subject, declared that "the question under consideration was not presented, for, although the defendant bank in that case was held to have contracted directly with the holder of the bill to collect it, the negligence alleged was the negligence of its own officers in the place where the bank was situated," *Exchange Nat. Bank v. Third Nat. Bank*, 112 U. S. p. 282.

(a) *Where this rule prevails.* This rule is followed in Connecticut,<sup>1</sup> Maryland,<sup>2</sup> Missouri,<sup>3</sup> Illinois,<sup>4</sup> Tennessee,<sup>5</sup> Iowa,<sup>6</sup> Wisconsin,<sup>7</sup> Kansas,<sup>8</sup> and Mississippi.<sup>9</sup> "The authorities which support this rule," says Judge Blatchford,<sup>10</sup> "rest on the proposition that since what is to be done by a bank employed to collect a draft payable at another place, cannot be done by any of its ordinary officers or servants, but must be entrusted to a sub-agent, the risk of the neglect of the sub-agent is upon the party employing the bank, on the view that he has impliedly authorized the employment of the sub-agent, and that the incidental benefit which the bank may receive from collecting the draft in the absence of an express or implied agreement for compensation, is not a sufficient consideration from which to legally infer a contract to warrant against loss from the negligence of the sub-agent."

§ 465. **Liability for neglect of notaries.** While the two rules are thus clearly defined other rules apply to collecting banks for the negligence of notaries that are employed by themselves or by sub-collecting agents.

**First.** *Where principal bank is liable for negligence of notary.* In New York and New Jersey a collecting bank is liable for the negligence of a notary or correspondent as well as of its own immediate servants in presenting notes and giving notices.<sup>11</sup> "If," says Judge Allen, "the bank employs a notary

<sup>1</sup> *Lawrence v. Stonington Bank*, 6 Conn. 521; *East-Haddam Bank v. Scovil*, 12 Id. 303.

<sup>2</sup> *Jackson v. Union Bank*, 6 Harr. & Johns. 146.

<sup>3</sup> *Daly v. Butchers & Drovers' Bank*, 56 Mo. 94.

<sup>4</sup> *Ætna Ins. Co. v. Alton City Bank*, 25 Ill. 243.

<sup>5</sup> *Bank of Louisville v. First Nat. Bank*, 8 Baxter, 101.

<sup>6</sup> *Guelich v. National State Bank*, 56 Iowa, 434.

<sup>7</sup> *Stacy v. Dane County Bank*, 12 Wis. 629.

<sup>8</sup> *Bank v. Ober*, 31 Kansas, 599.

<sup>9</sup> *Third Nat. Bank v. Vicksburg Bank*, 61 Miss. 112; *Tiernan v. Commercial Bank*, 7 How. (Miss.) 648.

<sup>10</sup> *Exchange Nat. Bank v. Third Nat. Bank*, 112 U. S. 276.

<sup>11</sup> *Allen v. Merchants' Bank*, 22 Wend. 215; *Ayrault v. Pacific Bank*, 47 N. Y. 570; *Titus v. Mechanics' Nat. Bank*, 35 N. J. Law, 588; *Davey v. Jones*, 42 Id. 28; *Patterson Bank v. Butler*, 7 N. J. Eq. 268. In South Carolina when

to present a promissory note for payment and give the proper notices to charge the parties, the notary is the agent of the bank, and not of the depositor or owner of the paper. A notary is not necessarily employed, as the service can be performed by any clerk or other servant of the bank. This general liability may be varied by express contract or by implication arising from general usage.<sup>1</sup> . . But the practice and usage of the banks adopted for their own convenience cannot vary the contract between them and their dealers."

(a) *When direction has been given to bank concerning protest.* Nor does a direction to the collecting bank to protest the note if it be not paid, mean simply the handing of it to a notary, thereby discharging the bank in the event of his failure to perform his duty. Such a direction is not a special contract limiting the liability of the bank, and it is required to make demand in proper form and at a proper time and in case of non-payment due and reasonable notice to the indorsers.<sup>2</sup>

(b) *Ignorance of legal duty no excuse.* When a debt is lost by the omission of a notary to give notice of the non-acceptance of a bill presented before maturity, the collecting bank cannot be excused on the ground of not knowing its legal duty in the matter. Thus a bill of exchange drawn in New York on a resident in Philadelphia, which was deposited for collection at a New York bank, was lost to the holder in consequence of the omission of the bank to give notice of the refusal to accept the bill. The bank defended on the ground that neither protest nor notice of non-acceptance was necessary to bind drawer or indorser in Pennsylvania. But the bill was drawn in New York and was therefore governed by the law of that State which required the notice of non-acceptance to be given. Said the court: "Those who undertake to collect foreign paper are as much bound to inform themselves as to what is necessary to protect the holders of such paper

a bank places a note left for collection in the hands of a notary public, he will be regarded as an agent of the bank, for whose omissions or mistakes the bank is liable, *Thompson v. Bank*, 3 Hill, 77; S. C., *Riley*, 81.

<sup>1</sup> *Ayrault v. Pacific Bank*, 47 N. Y. p. 574.

<sup>2</sup> *Id.* 570.

as if it were domestic, and governed wholly by their own local law."<sup>1</sup>

**Second.** *Where sub-agent is liable for negligence of notary.* In Kansas,<sup>2</sup> the sub-agents are liable for the negligence of the notaries employed by them.

**Third.** *Where principal bank is responsible for sub-agent, but not for notary.* In Ohio and in Federal practice the collecting bank, though responsible for the negligence of the sub-agent is not responsible for the negligence of the notary. The reason is that he is an independent officer.<sup>3</sup> In a case requiring the application of the principle the Ohio court said that "the bank in taking the paper for collection agrees to collect it if paid, and if not paid to hand it to a reputable notary in season. We think this may be said to be the natural import of the act of delivery by the one and of taking by the other, especially in a jurisdiction where the notary can act only as an independent public officer."<sup>4</sup>

(a) *Britton v. Niccolls.*<sup>5</sup> In another case decided by the Supreme Court of the United States, Judge Field said: "It is enough here that the notary was not in this matter agent of the [collecting] bankers. He was a public officer whose duties were prescribed by law, and when the notes were placed in his hands, in order that such steps should be taken by him as would bind the indorsers if the notes were not paid, he became the agent of the holder of the notes. For any failure on his part to perform his whole duty he alone was liable; the bankers were no more liable than they would have been for the unskilfulness of a lawyer of reputed ability and learning to whom they might have handed the notes for collection in the conduct of a suit brought upon them."

<sup>1</sup> *Allen v. Merchants' Bank*, 22 Wend. p. 239.

<sup>2</sup> *Bank v. Ober*, 31 Kan. 599.

<sup>3</sup> *Bank v. Butler*, 41 Ohio St. 519.

<sup>4</sup> *Bank v. Butler*, Id. p. 525; *Tiernan v. Commercial Bank*, 7 How. (Miss.) 648; *Agricultural Bank v. Commercial Bank*, 7 Sm. & M. 592; *Bowling v. Arthur*, 34 Miss. 41.

<sup>5</sup> 104 U. S. 757.

(b) *Is responsible for notary appointed by itself.* But a collecting bank is responsible for the negligence of a notary appointed by it for a year, and from whom a bond is required for the faithful discharge of his duties, in failing to give notice to an indorser of a negotiable promissory note of a demand upon and refusal of payment by the maker by which the indorser was discharged. The notary, when thus appointed, is not an independent officer in the discharge of a duty devolved upon him by law, but is the agent of the bank.<sup>1</sup>

**Fourth.** *Where principal bank is responsible for neither sub-agent nor notary.* The fourth rule is that a collecting bank which is not responsible for the negligence of the sub-agent is not responsible likewise for the negligence of a notary employed by it.<sup>2</sup>

§ 466. **Liability of bank for sub-agent by agreement.** If a bank be not responsible for the negligence of a sub-agent, it may become so by special agreement. Thus, if a bank in Philadelphia should enter into a special agreement or receive a pecuniary reward for its service in collecting bills, beyond a mere charge to cover expense, and a bank in Virginia should be its agent for that purpose, it would be responsible for the neglect of the Virginia bank.<sup>3</sup>

§ 467. **Duty of principal bank to notify sub-agent about indorser.** If a banker at St. Paul, Minnesota, for example, receive a note for collection payable at St. Anthony, and is

<sup>1</sup> *Gerhardt v. Boatman's Sav. Institution*, 38 Mo. 60. This is New York doctrine, *Allen v. Merchants' Bank*, 22 Wend. 215, and other cases; *Reeves v. State Bank*, 8 Ohio St. 465; *American Express Co. v. Haire*, 21 Ind. 4; *Branch of Bank of State of Ala. v. Knox*, 1 Ala. 148; *Bank of Mobile v. Huggins*, 3 Id. 206; *Taber v. Perrot*, 2 Gall. 565; *Van Wart v. Woolley*, 3 Barn. & Cr. 439. But not in Connecticut, *East-Haddam Bank v. Scovil*, 12 Conn. 303; *Warren Bank v. Suffolk Bank*, 10 Cush. 582; *Citizens' Bank v. Howell*, 8 Md. 530; *Bowling v. Arthur*, 34 Miss. 41; *Hyde v. Planters' Bank*, 71 La. 560; *Bellemire v. Bank of United States*, 1 Miles. 173; *Aff. in 4 Whart.* 105.

<sup>2</sup> *Agricultural Bank v. Commercial Bank*, 7 Sm. & M. 592; *Tiernan v. Commercial Bank*, 7 How. (Miss.) 648; *Bowling v. Arthur*, 34 Miss. 41.

<sup>3</sup> *Mechanics' Bank v. Earp*, 4 Raw. 384.

informed that there are two persons of the same name as the indorser, one of them residing at St. Paul and the other at Nininger, not far away, and that the one residing at the latter place is the indorser, the banker should convey this information to the agent employed at St. Anthony to collect the note. Said the court in a case of this kind: "No custom could absolve the banker from this duty, as it was the very essence of his undertaking, the fixing of the liability of the indorser."<sup>1</sup>

§ 468. **Duty of bank to depositor for note left for collection through another bank.** When a bank receives a note from a depositor for the purpose of transmitting it to another bank where it is payable for the purpose of receiving payment, a sub-agency is not created, the depository therefore is not responsible for the negligence of the other. Thus in *Indig's case*<sup>2</sup> a note was sent by the National City Bank of Brooklyn to a bank in Lowville for collection. *Indig* contended that the Brooklyn bank constituted the Lowville bank its agent to receive payment of the note, and was therefore liable for the amount which was paid by charging the same to the account of the maker who was also a depositor. So he sued the Brooklyn bank, the other having failed, for the amount of the note. The court, however, did not think that an agency had been created. "The note," said Judge Rapallo, "in so far as it relates to its presentment at the bank and the duties of the bank in respect to it, was equivalent to a check drawn by the maker upon the bank where the note was made payable."<sup>3</sup> The bank owed a duty to its customer to pay it on presentation, if in funds. The defendant used the United States mail to make the presentment, and by this means caused it to be presented to the bank for payment on the day when due. It did not deposit it there for collection. If there had been indorsers it might be argued that the defendant constituted the bank of Lowville its agent to notify the indorsers of non-

<sup>1</sup> *Borup v. Nininger*, 5 Minn. 523, p. 555.

<sup>2</sup> 80 N. Y. 100.

<sup>3</sup> *Ætna Nat. Bank v. Fourth Nat. Bank*, 46 Id. 82.

payment, but even this is very questionable, for it was held in a similar case that if the proceeds were not remitted the paper should be deemed dishonored, and notice of non-payment should be given by the bank which had sent it.<sup>1</sup> No such question arises however in the present case for there were no indorsers. The defendant by sending the note to the bank of Lowville requested it to pay it, not to receive the proceeds. The object of sending was to extract money from the bank as agent of the maker of the note, not to put money in the bank as agent of the defendant, or to the credit of the defendant. There is nothing in the nature of the transaction which should render the defendant guarantor of the solvency of the Bank of Lowville. It was recently held by this court in the case of the *People v. The Merchants & Mechanics' Bank of Troy*<sup>2</sup> that by sending a check through the mail to the bank on which it was drawn, the sender did not constitute that bank its agent to receive the proceeds. And, as before said, a note payable at a bank where the maker keeps his account is equivalent to a check drawn by him upon that bank, except that in the case of a note the failure to present for payment does not discharge the maker. But as far as the question now under consideration is concerned, the effect is the same. The bank on which the note is drawn has nothing to do but to pay the note if in funds, and if not, to refuse to pay. If it pays, it does so on behalf of the maker, and no relation is created between it and one who presents it by mail different from that which would exist if presented through any other agency, unless accompanied by a request to do some further act in behalf of the sender beyond complying with its duty to its own customer." The same principle had been long before applied in Pennsylvania.<sup>3</sup> But if a bank accept a draft from a customer for collection, and no special contract is made concerning its liability, the bank is liable for the amount

<sup>1</sup> *Bailey v. Bodenham*, 16 C. B. N. S. 288.

<sup>2</sup> 78 N. Y. 269.

<sup>3</sup> *Mechanics' Bank v. Earp*, 4 Raw. 384.



in the event of the failure of an agent who has collected the same.<sup>1</sup>

§ 469. **Sub-collecting bank cannot acquire title to draft against true owner.** If a collecting bank put a bill into another bank as security for a prior loan the title of the second bank will not stand against the owner.<sup>2</sup> And if a collecting bank deliver a note, which has been indorsed for collection to a sub-agent, and afterward fail owing the sub-agent on account of overdrafts, the latter cannot keep the note or its proceeds from the true owner. Thus M., who owned a note and draft, indorsed them in blank and delivered them to the State Bank of West Virginia with a letter of instruction to collect the same. It sent them to the defendant bank with an indorsement that they were for collection. Before either was collected, the State Bank failed, owing the other for overdrafts. M. demanded the note and draft of the defendant bank, but it refused to give them to him, and claimed that it could rightfully apply the proceeds on the indebtedness of the State Bank. M. having assigned the note and draft to the plaintiff, it was decided that he could recover them of the latter institution.<sup>3</sup>

§ 470. **Title of first bank to draft is not lost by sending it to sub-agent.** As a bank that receives drafts merely for collection is the agent of the holder for that purpose its title is not divested by sending them to another bank to be collected. Consequently the first bank has the right to present them for payment whenever the other becomes insolvent without subjecting itself to liability as the drawer in a suit by the receiver or ceiver of the insolvent institution.<sup>4</sup>

§ 471. **If instructions to principal bank be violated sub-agent cannot be held therefor.** If a draft be deposited with a bank and its instructions with respect to collecting the same

<sup>1</sup> *Power v. First Nat. Bank*, Montana Sup. Ct., 12 Pacific Rep. 597.

<sup>2</sup> *Lee v. Smead*, 1 Met. (Ky.) 628.

<sup>3</sup> *Stark v. United States Nat. Bank*, 4 N. Y. State Rep. 56.

<sup>4</sup> *Atkinson v. Stafford*, N. Y. Sup. Ct., 20 Week. Dig. 49.

and keeping the proceeds are violated, the depositor cannot hold the sub-agent liable. Thus a draft was deposited with instructions to treat it as a separate fund. It was forwarded by the bank to its correspondent for collection and credit. The deposits of the correspondent bank were constantly changing by reason of drafts and deposits so that no specific moneys could be identified. The original depositor on the failure of the first bank could not reclaim the entire amount of his draft from funds then remaining in the correspondent bank to the credit of the other, nor could he recover more than his *pro rata* share like any other creditor.<sup>1</sup>

§ 472. **Liability of bank for branch bank.** A promissory note payable twelve months after date at the Citizens' Bank in New Orleans, and indorsed by A., the payee, and by B., the owner, who resided in Missouri was sent for collection to a branch of the Louisiana State Bank at Baton Rouge. The cashier indorsed the note and forwarded it to the mother bank at New Orleans. It was duly protested for non-payment by the notary of the mother bank, and notices of protest for the indorsers were mailed to the cashier of the branch bank. A., on whom reliance was principally placed for payment, died, and his executor was duly qualified before the maturity of the note, but neither he nor B. was served by the branch bank with notice of protest. The bank therefore was declared liable for any loss sustained by the holder of a note.<sup>2</sup>

<sup>1</sup> Edson v. Angell, 58 Mich. 336.

<sup>2</sup> Bird v. Louisiana State Bank, 93 U. S. 96.

## CHAPTER III.

## PROCEEDS OF COLLECTIONS.

§ 473. **Bank can receive only money.** In the absence of special authority or usage a collecting bank has a right to receive only money in payment. And if it receive the debtor's check on another bank this is conditional payment only, and it becomes the agent of the drawer of the check to receive the money; until this is received the payment is not complete.<sup>1</sup> Hence a collecting bank without instructions cannot be relieved from paying the amount in lawful money by showing that Confederate notes, for example, were in circulation at the time the note was collected, and that it received and paid these indifferently with other currency. It would be protected though in receiving them if it could show that the owner of a note, sent for collection, knew that such notes were received in payment and assented to or ratified the taking of them.<sup>2</sup> In Alabama a depositor left notes and drafts for collection between November, 1861, and April of the following year, without giving instructions concerning the kind of funds to be received and making no demand for them until after the close of the war. In this case it was decided that he could recover no more than the value of the Confederate currency at the time of making the demand.<sup>3</sup>

§ 474. **Bank is debtor, not agent, for amount.** "As a general rule, after the collection is made the bank becomes a simple contract debtor for the amount, less any commissions which may be charged. If the party for whom the collection

<sup>1</sup> *Levi v. National Bank*, 5 Dill. 104; *Ward v. Smith*, 7 Wall. 447; *Merchants' Nat. Bank v. Goodman*, 14 Week. No. Cas. 531; S. C., 16 Id. 513.

<sup>2</sup> *Greeves v. Louisiana State Bank*, 22 La. Ann. 228.

<sup>3</sup> *Henry & Co. v. Northern Bank*, 63 Ala. 527; *Planters' Bank v. Union Bank*, 16 Wall. 483.

was made was a regular depositor the sum would be placed to his credit upon his regular deposit account, unless some peculiar usage or special instruction should demand a different course of dealing. If the party has no deposit account the bank simply owes him the amount on demand."<sup>1</sup> In Illinois if a collection is mingled with other funds of the bank it becomes a general deposit and is governed by the same rules. Hence if the money collected depreciates the bank must suffer the loss.<sup>2</sup> This rule though does not apply everywhere.<sup>3</sup>

(a) *Unless bank is insolvent before collecting.* But it does apply very generally to solvent collecting banks. In the event of failure the Supreme Court of Texas has remarked that both on principle and authority a bank ceases to have the general power and authority which it previously had to collect paper. The "subsequent collection must be held by it as agent in trust for the owner."<sup>4</sup>

§ 475. **Use of proceeds by collecting bank.** (a) *First National Bank v. Gregg & Co.*<sup>5</sup> A collecting bank has no right to use the proceeds of a collection for its own benefit. Thus a note made to the order of Gregg & Co. and indorsed by them was sent through B.'s banking house for collection. B. indorsed the note and sent it to the defendant bank "for collection and credit." By indorsing the note B. did not become the owner of it and had no right to pledge it or direct its proceeds to be credited to him in payment of his indebtedness to the bank. If, however, the bank had made advances or had given a new credit to Brady on the faith of the note it could have retained the amount from the proceeds.

(b) *Charlotte Iron Works Case.*<sup>6</sup> An interesting question occurs when a collecting bank diverts the proceeds of a bill

<sup>1</sup> Bonner, J., *Jockusch v. Towsey*, 51 Texas, p. 132; *Planters' Bank v. Union Bank*, 16 Wall. 483; *In re Bank of Madison*, 9 N. Bank. Reg. 184; *Duncan v. Magette*, 25 Texas, 245; *Tinkham & Co. v. Heyworth*, 31 Ill. 519.

<sup>2</sup> *Marine Bank v. Rushmore*, 28 Id. 463.

<sup>3</sup> See § 277.

<sup>4</sup> See § 277. *German American Bank v. Third Nat. Bank*, 2 Texas L. J. 150.

<sup>5</sup> 79 Pa. 384.

<sup>6</sup> *Charlotte Iron Works v. American Ex. Nat. Bank*, 34 Hun, 26.

or note collected from its true destination, for example, when it uses the money collected to extinguish an obligation of its own without any knowledge by the payee of the source whence it came. Such a case arose in New York. The Charlotte Iron Works held a draft which was accepted by Dunning, payable December 19th, at the National Exchange Bank of Auburn. Several days before maturity the draft was sent by the holder to the City Bank of Rochester, where an account was kept, stating that it was sent for collection, and directing that the proceeds be credited to its account. On December 9th the City Bank sent the draft to the Auburn bank, where it was payable, directing it to send the proceeds when collected to the American Exchange Nat. Bank of New York City. On the 19th of December the Auburn bank charged the amount of the draft to Dunning, drew its own draft on the National Park Bank of New York City to the order of the cashier of the American Exchange Nat. Bank, and sent the same to it by mail, stating that it should be credited to the City Bank. The draft was paid the next day through the clearing house and credited to the City Bank, which at that time was indebted for more than that amount to the American Exchange Nat. Bank. The City Bank was insolvent on the 19th of December and closed its doors at three o'clock in the afternoon. It was decided in a suit by the Charlotte Iron Works against the American Exchange Nat. Bank that as it had received the draft of the Auburn bank and had applied the amount in good faith toward the discharge of a debt due to it from the City Bank, it could retain the money.

"All persons," said Judge Barker in his opinion, "dealing with the City Bank in the due course of business and in good faith, acting upon the assumption that it was the owner of the draft and its proceeds and being ignorant that it was the mere agent of the plaintiff, the owner, are protected by well-settled principles. By the several transactions had, the Dunning acceptance was paid up in cash. There was no longer in existence any paper representing the plaintiff's debt.

against Dunning. In legal effect the debt had been paid in money to the defendant. This money came to the defendant from one of its customers, who was its debtor, in the due course of business, with directions to credit the same on its overdrawn account. The transaction is the same and the defendant's title to the money as good as if Dunning had paid the draft in currency and the Auburn bank had remitted the identical moneys to the defendant in compliance with the order given to it by the City Bank of Rochester. The intermediate transaction, which was adopted by the bank in Auburn, to secure a transmission of the proceeds to the defendant was for its own convenience and was the customary mode of making remittances between those places. The collection through the clearing house was in legal effect the same as if the defendant had sent the draft for payment by its own messenger, and at the counter of the Park Bank had received the currency and returned it to the defendant, and the amount credited to the City Bank of Rochester as cash paid on its indebtedness."<sup>1</sup>

(c) *When principal cannot follow the money.* "As a general rule where the trustee or agent has converted the subject of his trust or agency into money and pays the same in the due course of business, in discharge of his own indebtedness, to one ignorant of the nature of his title, the payee acquires a perfect and indefeasible one as against the real owner. In such a case the right to follow the money by the principal is gone."<sup>2</sup>

(d) *The case of Espy v. Bank of America* is instructive. Espy had been accustomed for two years to send frequently to the defendant bank notes and drafts for collection on a merchant residing in the town where it did business. They were presented and almost always he drew drafts on mer-

<sup>1</sup> *Indig v. National City Bank*, 80 N. Y. 100; *First Nat. Bank v. Leach*, 52 Id. 350; *Justh v. National Bank*, 56 Id. 478; *Turner v. Bank*, 3 Keyes, 425.

<sup>2</sup> *Charlotte Iron Works v. American Ex. Nat. Bank*, 34 Hun, 26, p. 30; *Wood v. Boylston Nat. Bank*, 129 Mass. 358; *Stephens v. Board of Education*, 79 N. Y. 183.

chants in Cincinnati for the amount, which were accepted by the bank and sent to Espy, who never returned any of them. Finally a draft which was thus sent not having been paid, Espy tried to recover the amount from the bank. But it was decided that by accepting such drafts for so long a period a custom was created in favor of the defendant, and consequently that he was relieved from paying.<sup>1</sup>

(e) In *Bank of Attica v. Metropolitan National Bank*<sup>2</sup> the latter institution collected several drafts that were sent by the other and applied the proceeds by direction of another party to discharge commercial paper in its possession belonging to the Bank of Attica. This, however, was a violation of its duty and the Bank of Attica recovered the amount. In another case A. drew his draft on B., payable to the Bank of Dansville and sent it there for collection, with specific instructions to remit the proceeds. The draft was duly paid, but instead of remitting the proceeds (as the bank was insolvent) it drew another draft on a corresponding bank for the amount, payable to A. and sent this to him. He sent this draft for collection, but it was returned dishonored. It was decided that this draft was no payment, that the Bank of Dansville was merely a bailee of A.'s funds, and, therefore, he could follow them into the hands of its receiver.<sup>3</sup>

§ 476. **Bank should not send check to drawee for payment.** "It is not a reasonable usage that one who collects a draft for an absent party, should be allowed to give it up to the drawee and sacrifice the claim which the owner may have on prior parties, upon the mere receipt of a check which may turn out to be worthless."<sup>4</sup> The collecting bank should send it to an independent agent for collection, and who, furthermore, should receive money and not another instrument in payment. If, therefore, a bank should give a check received from a depositor to the drawee bank for payment, and should accept

<sup>1</sup> New York Daily Reg., Jan. 7th, 1885.

<sup>2</sup> 97 N. Y. 639.

<sup>3</sup> *People v. Bank of Dansville*, 23 Week. Dig. 358.

<sup>4</sup> *Chapman, C. J., Whitney v. Esson*, 99 Mass., p. 311.

in return its check on another bank which is not paid, the depositor could recover the amount from the depository.<sup>1</sup>

**§ 477. Rights of parties when one note is wrongfully taken for another.** As a collecting bank should not take another note for the one to be collected, if it does so and fails, what claim has the owner of the note first sent on the collecting bank? This question was decided in a Kansas case. The Harrison National Bank sent a note for \$2000 to the Riley County Bank for collection. The latter bank, instead of collecting it, took a new note for the amount payable to itself, and not long afterward failed. The Harrison Bank sought to have the court declare that the assignee of the Riley Bank was a trustee of a fund to the amount of \$2000 belonging to the other bank. This the court would not do. Judge Valentine said that other creditors beside the Harrison Bank had rights to the general funds and assets of the insolvent bank, and that their rights must be protected. The most that could be done in such a case by the Harrison Bank was to recover the note from the assignee and then sue the maker.<sup>2</sup>

**§ 478. How long authority continues to collect.** "A bank at which a negotiable note is payable, and at which it is deposited for collection, is of course the agent of the holder or depositor to receive the money if paid at such bank at the maturity of the note, and, though not then paid, has no doubt implied

<sup>1</sup> Merchants' Nat. Bank v. Goodman, 16 Week. No. Cas. 513; Aff. 14 Id. 531. The leading features in this case are stated more fully and with accuracy by the reporter in the head-note: A bank with which a check is deposited by a customer for collection, under an agreement that the depositor's liability as indorser shall continue until payment is ascertained by the bank, is bound to transmit the check to an independent agent for collection, with instructions to present the same for payment, and if this be refused, to have the check protested and immediately returned. It should not send the check to the drawee bank and accept from it a draft on another bank in payment. If it does so, the original check is cancelled, and the account of the drawer is charged with the amount, and if by reason of the failure of the bank on which the check is drawn, the draft remains unpaid, the first bank is responsible to the depositor.

<sup>2</sup> National Bank v. Ellicott, 31 Kansas, 173.



authority to receive the money at any time thereafter and while the note remains at the bank. It very often happens that such a note is taken up at bank shortly after the protest, and with a view to save the credit of the debtor; and it therefore very often happens that a protested note is suffered by the owner to remain at bank some time after protest, with a hope that it may be thus taken up." In regard to notes payable at a bank in Virginia before the civil war, deposited for collection, and protested for non-payment, but neglected to be withdrawn from bank by the owner residing in that State, it was questioned whether after the lapse of two or three years, the bank would have authority to receive payment of such notes in a currency which came into existence after the protest of the note, and which at the time of such payment had depreciated in value as 12 to 1 compared with specie, in which payment might legally have been demanded; or whether the debtor having notice of the facts could make a valid payment of the note in such a currency and under such circumstances. It might not be reasonable to infer an authority to receive payment in such a currency under such circumstances from the mere omission to withdraw the notes from the bank. But in the case of a non-resident owner a bank would have no authority to receive payment of notes in depreciated Confederate currency.<sup>1</sup>

§ 479. **Remedy.** When a collecting bank fails to pay over the money received on drafts collected for another, between which an account is kept, the remedy is against the defaulting bank and not against the drawers.<sup>2</sup>

<sup>1</sup> *Alley v. Rogers*, 19 Gratt. 366.

<sup>2</sup> *Kupfer v. Bank of Galena*, 34 Ill. 328.

## CHAPTER IV.

## DAMAGES.

§ 480. **Amount recoverable.** The damage that may be recovered of the collecting bank when in the wrong is the amount actually sustained by the sender. If the instrument left for collection be a bill of exchange, for example, and the bank should omit to take proper steps to charge the drawer and indorsers, the damage would be the face of the bill with interest.<sup>1</sup>

§ 481. **Bank not liable for expense in prosecuting indorser.** But a bank which is thus liable for the amount of a note and interest is not liable for the costs and expenses incurred in prosecuting the indorser.<sup>2</sup>

§ 482. **Damage recoverable in Culver, Penn & Co. cases.** In the litigation growing out of the failure of Culver, Penn & Co., which has been described, the damage recoverable was declared to be the amount actually sustained by the sender, which on that occasion was the Meadville Bank. But as the drawer or Crawford County Bank was bound, the necessary steps for that purpose having been taken, the law presumed that it was solvent and responsible for the amount of the draft, and consequently only nominal damage was recovered against the collecting agent. This presumption, however, does not stand in the way of proving and recovering the actual loss incurred by the negligence of the collecting bank. Accordingly, on a second trial of the case, for the purpose of showing damage to the full amount of the draft, the Meadville Bank offered in evidence the judgment record of a

<sup>1</sup> American Express Co. v. Haire, 21 Ind. 4; Chapman v. McCrea, 63 Id. 360; Tyson v. State Bank, 6 Blackf. 225.

<sup>2</sup> Downer v. Madison County Bank, 6 Hill, 648.

Pennsylvania court in an action on the draft whereby it was adjudged that the acceptance of the check and omission to make due presentment constituted as between the Crawford County, Meadville and Fourth National Banks a payment, and discharged the drawer's liability. This record was regarded competent evidence and conclusively established the damage of the Meadville Bank to be the full amount of the draft. It may be also added that it was declared to be not necessary to tender the draft to the Fourth National Bank before beginning the suit thereon.<sup>1</sup>

§ 483. **Remarks of Minnesota court on the subject.** In a well reasoned Minnesota case for negligence in collecting a note the court said: "The defendants may mitigate the damages by showing either the solvency of the maker, the insolvency of the indorser, or that the paper was partially or wholly secured, or any other fact that will lessen the actual loss to the plaintiff; the real loss occasioned by the improper conduct of the defendant being the fact for the jury to arrive at in measuring the plaintiff's damages."<sup>2</sup> But the mere fact that the indorser was in embarrassed circumstances is immaterial and forms no defence.<sup>3</sup> "In an action for neglecting to protest a note whereby the liability of an indorser has been lost, the parties sued have a right to show on the question of damages any such state of facts as will tend to show that the loss of the plaintiff has been less than the face of the obligation of the maker. The general rule is that in an action for negligence the plaintiff can recover no more than the amount which will fully compensate him for the injury sustained by the negligence in question. And in an action of this particular character, the defendant may show that the creditor holds collateral securities for the payment of the debt to which he may resort in diminution of the damages which would *prima*

<sup>1</sup> First Nat. Bank of Meadville v. Fourth Nat. Bank of New York, 89 N. Y. 412.

<sup>2</sup> Borup v. Nininger, 5 Minn. 523, p. 549, citing among other cases, Hoard v. Garner, 3 Sand. 179; Blot v. Boiceau, 3 N. Y. 78.

<sup>3</sup> Steele v. Russell, 5 Neb. 211.

*facie* appear to have been sustained by the negligent omission to charge the indorser.”<sup>1</sup>

§ 484. **Loss must be proved.** (a) *Indig's case.*<sup>2</sup> In order to recover of a collecting agent the party suing must prove that he has sustained loss. Indig deposited with a Brooklyn bank for collection a note to which there was no indorser save the maker. It was payable at a bank in Lowville, of which the maker was also a customer. The Brooklyn bank sent the note by mail to the other, which was the ordinary way of doing such business. It reached the bank on the day of maturity, a draft for the amount was sent to the Brooklyn bank the next day, before the end of which, however, the Lowville bank failed. The maker did not have a deposit at that time in the bank sufficient to pay the note, but he paid the balance after the failure. The Brooklyn bank received the draft the next day, Saturday, after business hours, and forwarded it on Monday morning in the usual course of business to the clearing house in New York, which returned it “not good.” The Brooklyn bank immediately gave Indig notice of the non-payment of the note. He tried to recover the amount of the note of the Brooklyn bank on the ground of negligence, but the court held that it did not appear he had suffered any damage, for the receipt of the draft was not payment, and consequently the maker was not discharged from liability.

(b) *North Carolina case.* In the *Bank of New Hanover v. Kenan*,<sup>3</sup> Moffit drew a check on that bank (of which he was a depositor) on the 6th of September, and which it received three days afterward. The bank having neglected to collect it, Judge Bynam, speaking for the court, said that “the measure of damages which the holder is entitled to recover of the bank or collecting agent who has been guilty of negligence is the actual loss which has been suffered. That loss, *prima facie*, is the full amount of the bill or note; but evi-

<sup>1</sup> Talcott, J., *Mott v. Havana Nat. Bank*, 22 Hun, 354, p. 358, citing *First Nat. Bank v. Fourth Nat. Bank*, 77 N. Y. 320; *Allen v. Suydam*, 20 Wend. 321.

<sup>2</sup> *Indig v. National City Bank*, 80 N. Y. 100.

<sup>3</sup> 76 N. Car. 340.

dence is admissible to reduce it to the actual loss.<sup>1</sup> But this is the rule of general application only, and is modified in its adaptation to a particular class of cases of which the present is an example. Here the bank was the creditor and the check was drawn on and was payable by the bank—the agent. The undertaking of the bank was to collect a check on itself. Of necessity it must be assumed that it was presented for payment, that it acted upon, at the time it was payable by the bank. If it was then accepted by the bank, the amount of the check became a cash deposit to the credit of the defendant, paid out of the funds of Moffit or charged to his account with the bank. If it was not accepted it was the duty of the agent to give notice to the holder and return the check. The bank did neither. There can be no doubt that a bank can so deal with a check that the law will imply an acceptance on its part. When a holder of a check presents it for payment the drawee has only a reasonable time to inspect his accounts and ascertain whether he is in funds to meet the demand; and such reasonable time is held not to exceed twenty-four hours; after this lapse of time the holder has right to know whether the check is accepted or dishonored. If the holder himself presents or sends the check to the bank he must apply at the end of this reasonable time, to know whether it is accepted; but if it is in the hands of the bank as a collecting agent, it must give the notice of acceptance or dishonor. The bank was here both drawee and collecting agent; it was fully cognizant of the state of its accounts with Moffit, on the 9th of September; it both received and paid out large deposits made by him up to the 13th of September. . . Why was this check not provided for? Moffit says he thought it had been, and had been paid out of his deposits, and had he known that it had not been paid he would have paid it or have failed sooner. Why was payment of the check not demanded and why was the defendant kept in ignorance of its non-payment until after the failure of Moffit became known to the world four

<sup>1</sup> *Stowe v. Bank of Cape Fear*, 3 Dev. 408.

days after it was payable? Upon the plainest principles of justice these peculiar circumstances of wilful neglect of a known duty constitute a case of constructive acceptance of the check and fix the bank for the full amount of it. The negligence of the bank has made the check its own, and the case is taken out of the general rule as to the measure of damages."

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